UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOEL Q. HACK, an individual, and
WREN BEAULIEU-HACK, an individual,

Plaintiffs,

Hon. Marianne O. Battani
Case No. 2:18-cv-13330

THE CHARTER TOWNSHIP OF MILFORD, a Michigan municipal corporation, TOWNSHIP OF MILFORD BOARD, a public body, DONALD D. GREEN, in his personal capacity and in his official capacity as Supervisor of Milford Township, and TIMOTHY C. BRANDT, in his personal capacity and in his official capacity as Building and Zoning Administrator of Milford Township,

Defendants.

DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW

BRIEF IN SUPPORT

CERTIFICATE OF SERVICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOEL Q. HACK, an individual, and
WREN BEAULIEU-HACK, an individual,

Plaintiffs,

Hon. Marianne O. Battani
Case No. 2:18-cv-13330

v.

THE CHARTER TOWNSHIP OF MILFORD, a Michigan municipal corporation, TOWNSHIP OF MILFORD BOARD, a public body, DONALD D. GREEN, in his personal capacity and in his official capacity as Supervisor of Milford Township, and TIMOTHY C. BRANDT, in his personal capacity and in his official capacity as Building and Zoning Administrator of Milford Township,

Defendants.

DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW

NOW COME the Defendants, **THE CHARTER TOWNSHIP OF MILFORD, TOWNSHIP OF MILFORD BOARD, DONALD D. GREEN** and **TIMOTHY C. BRANDT,** by and through their attorneys, **O'CONNOR, DeGRAZIA, TAMM & O'CONNOR, P.C.**, and for their Motion for Judgment as a Matter of Law pursuant to Fed.R.Civ.P. 50(a), state as follows:

1. This case arises out of a claim that Defendants placed unlawful conditions on Plaintiffs in their attempt to construct a residential driveway.

2. On October 17, 2018, Plaintiffs filed their five count Complaint in the Oakland County Circuit Court which Defendants subsequently removed to this Court. **(Complaint, ECF No. 1, Page ID 18-38)**.

3. On June 3, 2019, this Court issued an Opinion and Order Granting in Part Defendants' Motion for Summary Judgment. (**ECF No. 43**). Pursuant to the June 3, 2019 Opinion and Order, the only remaining issue for trial is whether the Defendants violated Plaintiffs' substantive due process rights. (**See Opinion and Order, ECF No. 43**).

4. A jury trial commenced in this matter on July 17, 2019 and on July 25, 2019 Plaintiffs concluded their case-in-chief.

5. Plaintiffs having been fully heard on their claim, Defendants now move for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(a).

6. Defendants are entitled to judgment as a matter of law because no reasonable jury could find a legally sufficient basis to find for Plaintiffs on their substantive due process claim.

7. Plaintiffs have failed to present evidence that the Defendants' actions constituted an egregious, arbitrary abuse of government power that "shocks the conscience" as required to sustain their due process claim. See *Buchanan v. Apfel*, 249 F.3d 485, 491 (6th Cir.2001); see also *Hussein v. City of Perrysburg*, 617 F.3d 828 (6th Cir. 2010).

8. Defendants Donald D. Green and Timothy C. Brandt are entitled to dismissal of Plaintiffs' claim on grounds of qualified immunity because Plaintiffs have not established a violation of a constitutional right that was clearly established at the time of the defendants' actions for which every reasonable officer would have understood that what he was doing violated that right. See *Harlow v. Fitzgerald*, 457 U.S. 800, 806; 102 S.Ct. 2727; 73 L.Ed.2d 396 (1982); *Saucier v. Katz*, 533 U.S. 194, 202; 121 S.Ct. 2151; 150 L.Ed.2d 272 (2001), overruled in part on other grounds in *Pearson v. Callahan*, 555 U.S. 223; 129 S.Ct. 808; 172 L.Ed.2d 565 (2009).

9. Additionally, it would be improper to submit the individual liability claims to the jury because "the issue of qualified immunity is a question of law to be resolved by the judge, not the jury." *Williams v. Pollard*, 44 F.3d 433, 434 (6th Cir. 1995); see also *Pesek v. City of Brunswick*, 794 F. Supp. 768, 793 (N.D. Ohio 1992) citing *Heflin v. Stewart County*, 958 F.2d 709, 717 (6th Cir.1992) ("The well-accepted rule is that the resolution of the qualified immunity defense is a pure question of law for the court to decide; hence, the question may not be put to the factfinder.") Consistently, decision on substantive due process claims is routinely reserved for the court. See, *e.g.*, *Pearson v. Grand Blanc*, 961 F.2d 1211, 1222 (6th Cir.1992) (deferential substantive due process review a matter of law for the court).

10. Viewing the evidence presented to the jury by Plaintiffs, it is clear that Defendants' actions did not "shock the conscience" as required to sustain a substantive due process claim. Dismissal is therefore warranted.

11. Defendants are similarly entitled to judgment as a matter of law on Plaintiffs' remaining claims for Declaratory Relief and Judgment (**ECF No. 1, Page ID 28-29**) and Injunctive Relief (**ECF No. 1, Page ID 30**) for the reasons that they have not established a substantive claim or an entitlement to the requested relief. (**See also, Defendants' Response to Plaintiffs' Emergency Motion for Preliminary Injunction, ECF No. 50, Page ID 1136-1487**).

WHEREFORE, Defendants respectfully request that this Honorable Court grant their Motion for Judgment as a Matter of Law and dismiss Plaintiffs' Complaint in its entirety with prejudice and award such other relief as this Court deems appropriate.

Respectfully submitted,

O'CONNOR, DEGRAZIA, TAMM & O'CONNOR, P.C.

BY:/s/ Richard V. Stokan, Jr.

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Dated: July 25, 2019

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOEL Q. HACK, an individual, and
WREN BEAULIEU-HACK, an individual,

Plaintiffs,

Hon. Marianne O. Battani
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THE CHARTER TOWNSHIP OF MILFORD, a Michigan municipal corporation, TOWNSHIP OF MILFORD BOARD, a public body, DONALD D. GREEN, in his personal capacity and in his official capacity as Supervisor of Milford Township, and TIMOTHY C. BRANDT, in his personal capacity and in his official capacity as Building and Zoning Administrator of Milford Township,

Defendants.

BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW

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ISSUES PRESENTED

I. WHETHER THIS MATTER SHOULD BE SUBMITTED TO A JURY WHERE PLAINTIFFS HAVE FAILED TO PRESENT SUFFICENT EVIDENCE FOR A REASONABLE JURY TO CONCLUDE THAT DEFENDANTS' ACTIONS VIOLATED THEIR SUBSTANTIVE DUE PROCESS RIGHTS.

Defendants answer: No.

Plaintiffs would answer: Yes.

This Court should answer: No.

II. WHETHER PLAINTIFFS HAVE ESTABLISHED AN ENTITLEMENT TO DECLARATORY OR INJUNCTIVE RELIEF.

Defendants answer: No.

Plaintiffs would answer: Yes.

This Court should answer: No.

CONTROLLING AUTHORITY

The controlling or most appropriate authority for the relief sought, in addition to Fed.R.Civ. 50, is:

I. This Court, and not a jury, must determine the remaining issues in this case. *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1221 (6th Cir. 1992); *Poe v. Haydon*, 853 F.2d 418, 424 (6th Cir.1988).

II. Defendants are entitled to dismissal of Plaintiffs' substantive due process claims. *Hussein v. City of Perrysburg*, 617 F.3d 828, 832 (6th Cir. 2010).

III. Individual Defendants are entitled to qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 806; 102 S.Ct. 2727; 73 L.Ed.2d 396 (1982); *English v. Dyke*, 23 F.3d 1086, 1089 (6th Cir. 1994).

IV. Plaintiffs have failed establish an entitlement to declaratory or injunctive relief. *Northeast Ohio Coal for Homeless and Srv. Emp. Inter. Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1009 (6th Cir. 2006); *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000).

INTRODUCTION

This case arises out of a claim that the Defendants placed unlawful conditions on Plaintiffs' attempt to construct a residential driveway in conjunction with construction of a single-family home. (**ECF No. 1, Page ID 18-36**). Specifically, Plaintiffs assert that the Defendants improperly issued a stop work order and required Plaintiffs to obtain unnecessary permits and engineering studies which denied them access to their property. A jury trial commenced on July 17, 2019 to determine whether Defendants' actions "shock the conscience" for purposes of Plaintiffs' substantive due process claim – the only remaining claim in this case. On July 25, 2019 Plaintiffs concluded their case in chief. Plaintiffs having been fully heard on their claim, Defendants now move for judgment as a matter of law pursuant to Fed.R.Civ.P. 50(a).

STATEMENT OF MATERIAL FACTS[1]

On or about June 13, 2016 Plaintiffs Joel Hack and Wren Beaulieu-Hack (collectively, "Plaintiffs") purchased a vacant 3.15-acre parcel of land located at 2610 Pearson Road in Milford Township for $75,000.00. (**Complaint, ¶ 11-13, ECF No. 1, Page ID 20**). Following the purchase, Plaintiffs submitted an application to the Milford Township Building Department ("Township") for a

[1] In the interest of judicial economy and because this evidence was previously submitted to the Court, and presented during trial, exhibits will be omitted from the present Motion.

building permit. The permit was requested through Plaintiffs' builder EBI, Inc. ("EBI") and its owner William Rogers to install a 2,116-foot premanufactured home on a new basement with a new garage. After the request was reviewed by the Township Building and Zoning Administrator Timothy Brandt ("Administrator Brandt"), the permit was issued on November 13, 2017. (**See 11/13/2017 Building Permit, ECF No. 16-2, Page ID 509**). The permit specifically provided that it "does not grant permission for additional or related work which requires separate permits". (***Id.***).

Pursuant to the permit, work began on the site in November 2017.[2] Shortly thereafter, the neighboring property owner to the east, David Mamo, who resides at 2488 Pearson Road, began expressing concerns that the construction could cause flooding on his property. Mr. Mamo's concerns were based on living next to the vacant site for 30 years and routinely observing standing water on the property.

As construction proceeded, Mr. Mamo's concerns were realized in February 2018 when he observed flooding on his property which he attributed to the construction activity taking place on the Plaintiffs' property. When Mr. Mamo contacted the Plaintiffs advising that he had not seen that much water on his own property in 30 years, Mr. Hack investigated. Mr. Hack observed standing water

[2] According to invoices from Hartland Septic, the contractor responsible for excavation services including filling and grading, construction on the site began on November 7, 2017. The initial construction of the driveway on November 7th and 8th required 311 yards of crushed concrete and 9 ½ hours of bulldozer time.

but was unable to confirm if the water was being diverted from his property onto the Mamo property. After that time, Plaintiffs ceased contact with Mr. Mamo, instead electing to communicate with his attorney.

In addition to contacting the Plaintiffs, Mr. Mamo contacted the Township regarding the flooding on his property which he believed was being caused by construction on Plaintiffs' property. In response to Mr. Mamo's complaint, Township Ordinance Officer William Bozynski was asked by Township Supervisor Donald Green to investigate. When Officer Bozynski inspected the property the standing water was gone, however, he observed a location where he believed surface water had flowed from the Plaintiffs' property onto the Mamo's property. He also noted that a berm had been constructed to block where the water was flowing on the Mamo's property indicating that water had flowed over that area. Because the flooding had resolved at the time of his site visit, Officer Bozynski concluded that the flooding was due to the recent rain event and he took no further action.

Mr. Mamo continued to voice complaints to the Township regarding construction on Plaintiffs' property during the spring of 2018. During this time Administrator Brandt took no action against the Plaintiffs as he was giving them an opportunity to complete the project which could not be completed during the wet season. He advised Plaintiffs' representatives, however, not to bring additional

material onto the property until the water issues were resolved. Specifically, Mr. Brandt was concerned that additional material placed on the property would exacerbate the already existing flooding on Plaintiffs' property and potentially spill over onto neighboring properties. Throughout the spring of 2018 construction proceeded on Plaintiffs' property. The construction included completion of the driveway as of April 26, 2018.

In June 2018, Administrator Brandt received notice from David Mamo that Plaintiffs brought additional fill material onto the property in violation of Township ordinances.[3] After the claim was confirmed, on June 13, 2018 Administrator Brandt issued a cease and desist letter to Plaintiffs' builder EBI directing them to cease "filling and grading activity" until receiving approval from the Township. (**See June 13, 2018 Letter, ECF No. 41-5**). The letter was based on the fill and grade permit requirement contained in Sec. 32-583 of the Township Code of Ordinances. (**See Township Ordinance Sec. 32-583, ECF No. 16-4, Page ID 513**). Along with the cease and desist letter, Administrator Brandt enclosed a standard Township form for an application for permit to dredge and/or fill which requested plans depicting the proposed area where fill was to be placed, the existing and proposed final elevations, location of existing drainage course and the boundaries of wetlands. In the meantime, Plaintiffs requested and were granted

[3] The presence of fill material was confirmed by Plaintiffs' builder Bill Rogers who did not deny the presence of fill material.

a temporary occupancy permit in July 2018 allowing them to occupy the home while the fill and grade permit application was being processed.

On or about August 14, 2018, Plaintiffs' engineering consultant, Boss Engineering ("Boss"), submitted a proposed engineering plan to the Township's Engineer Michael Darga, P.E. at Hubbell, Roth & Clark ("HRC"). (**See Boss Plan, ECF No. 41-6, Page ID 1081**). Mr. Darga reviewed the proposed grading plan and issued a letter on August 24, 2018, and indicated that he did not object to the grading plan. (**See 8/24/18 Letter, ECF No. 16-5, Page ID 515**). In his letter, Mr. Darga specifically noted that his recommendation assumed the existing contours on the plan were from the pre-development of the property and accurately reflected the pre-development conditions. (***Id***). Approval of the permit was then placed on the Township Board's September 19, 2018 meeting agenda.

On September 19th William Rogers appeared before the Township Board on behalf of the Plaintiffs. During the meeting, Mr. Mamo made a presentation regarding how the construction activities on Plaintiffs' property was negatively impacting his property including causing flooding.[4] (**See 9/19/18 Minutes, ECF No. 16-6, Page ID 520-521**). Mr. Rogers was not prepared to refute Mr. Mamo's

[4] In addition to the change in grade due to the construction of the house, according to a material list, 927 yards of material was hauled onto the site during construction. The estimate to complete the Boss Engineering plan calls for an additional 310 yards of crushed concrete. (**Driveway Work and Detention Pond Estimate, ECF No. 50-14, Page ID 1484**).

allegations and presented no rebuttal for the Township Board to consider. As a result of questions raised by Mr. Mamo, Township attorney, Jennifer Elowsky, indicated it would be appropriate for the Township Board to direct the issues raised to the Township's engineer and building official. (**See 9/19/18 Minutes, ECF No. 16-6, Page ID 521**). A motion was then made to table the fill and grade permit until the Township Board received more information from the Township's engineer. (***Id***).

At the request of the Township Board, the Township Engineer Mr. Darga re-reviewed the Boss plan. In an October 8, 2018 letter Mr. Darga provided his recommendations for additional information. (**10/8/18 Letter, ECF No. 16-7, Page ID 524**). Noting that the grading plans submitted with Plaintiffs' initial application appeared to have presented different pre-development conditions than what was originally present, Mr. Darga recommended that approval of the fill and grade permit be conditioned on the following:

1. The applicant must submit to the Township a drainage area map showing the entire tributary area to 2610 Pearson Road, determine the retention volume created a 10-year storm, and calculate the pre-construction area of the low spot that contained this volume. This information can be used to determine if additional retention volume needs to be provided with the proposed grading plan and if additional topographic information needs to be shown on adjacent properties.

2. The applicant must improve the proposed swales, according to Township standards, to divert water from behind the home to the low area. It appears that the current site grading may be

> impeding the flow of water from the east and not allowing it to make it to the low area.
>
> 3. The plans should include calculations to verify that any proposed culvert is properly sized to facilitate drainage to the low point west of the driveway. [***Id.***].

The application for the fill permit was to be considered at the Township Board's October 17, 2018 meeting. (**See 10/17/18 Minutes, ECF No. 16-8, Page ID 526-540**). Earlier that day *prior to* the Township Board's meeting, Plaintiffs filed this lawsuit in the Oakland County Circuit Court. The Township Board held a public hearing regarding Plaintiffs' application for a grade and fill permit on the evening of October 17, 2018. Plaintiffs were present at the meeting and represented by Counsel. (***Id.***). Ultimately, the Township Board voted to approve the permit subject to the three conditions recommended by the Township's engineering consultant. (***Id.* at 540**). In a subsequent meeting between the parties, the Township Engineer agreed to waive the request for additional topographical information. Instead of providing the requested information, which Plaintiffs engineer testified would take him four (4) hours at a cost of approximately $720.00, Plaintiffs have elected to litigate the case in court.

The Court having dismissed all of Plaintiffs' claims, with the exception of the substantive due process claim and Plaintiffs having concluded their case-in-chief, Defendants now move for judgment as a matter of law.

STANDARD OF REVIEW

Fed. R. Civ. P. 50(a) provides:

> (1) *In General.* If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:
>
> (A) resolve the issue against the party; and
>
> (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.
>
> (2) *Motion.* A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

Judgment as a matter of law should be granted when "viewing the evidence in the light most favorable to the non-moving party, there is no genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion, in favor of the moving party." *Noble v. Brinker Int'l, Inc.*, 391 F.3d 715, 720 (6th Cir.2004); See also *Gray v. Toshiba Am. Consumer Prods., Inc.*, 263 F.3d 595, 598 (6th Cir.2001).

LAW & ARGUMENT

I. Whether Defendants' Actions Violated Plaintiffs' Substantive Due Process Rights And Whether The Individual Defendants Are Entitled To Qualified Immunity Is A Question Of Law For This Court to Decide.

It would be improper for the Court to submit this case to a jury to determine whether Defendants' actions violated due process or whether the individual Defendants are entitled to qualified immunity because these are questions of law.

In *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1221 (6th Cir. 1992), a land use case, the Sixth Circuit echoed the foregoing in holding "that the application of this deferential standard of review [in the substantive due process context] *is a matter of law for the court*. Otherwise, federal juries would sit as local boards of zoning appeals." *Id*. [emphasis added]. Indeed, courts around the country have also widely considered substantive due claims under the "shocks the conscience" standard to be a question of law. See e.g. *Luckes v. County of Hennepin*, 415 F.3d 936, 940 (8th Cir. 2005) (stating that determining whether conduct "shocks the conscience" is a question of law); *Terrell v. Larson*, 396 F.3d 975, 981 (8th Cir. 2005) (en banc) ("Because the conscience-shocking standard is intended to limit substantive due process liability, it is an issue of law for the judge, not a question of fact for the jury."); *Collins v. City of Harker Heights*, 503

U.S. 115, 126, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992) ("arbitrary government action that must 'shock the conscience' of federal judges").

Moreover, it has been recognized that "the issue of qualified immunity is a question of law to be resolved by the judge, not the jury." *Williams v. Pollard*, 44 F.3d 433, 434 (6th Cir. 1995); see also *Pesek v. City of Brunswick*, 794 F. Supp. 768, 793 (N.D. Ohio 1992) citing *Heflin v. Stewart County*, 958 F.2d 709, 717 (6th Cir.1992) ("The well-accepted rule is that the resolution of the qualified immunity defense is a pure question of law for the court to decide; hence, the question may not be put to the factfinder."). As stated in *Poe v. Haydon*, 853 F.2d 418, 424 (6th Cir.1988), the "[r]esolution of qualified immunity is purely a question of law." The trial judge therefore "bears the ultimate responsibility" of resolving the questions raised by a defense of qualified immunity. *Id.*

The foregoing makes clear that the only issues remaining in this case – whether Defendants caused a violation of Plaintiffs' substantive due process rights and whether the individual Defendants are entitled to qualified immunity – are to be decided by this Court and not the jury. Further, the evidence presented by Plaintiffs at trial coupled with the legal authorities cited below, make clear that these issues must be resolved in Defendants' favor.

II. Plaintiffs Have Failed To Establish a Violation of Their Substantive Due Process Rights.

Plaintiffs have presented insufficient evidence at trial to sustain their claim arising under the substantive due process clause. Substantive due process has been defined as "the doctrine that governmental deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed." *Pearson*, *supra* 961 F.2d at 1216. The Sixth Circuit has recognized two types of substantive due process violations: (1) official acts are unreasonable and arbitrary and "may not take place no matter what procedural protections accompany them," and (2) official conduct that "shocks the conscience." *Harris v. City of Akron*, 20 F.3d 1396, 1405 (6th Cir. 1994). (internal citations and quotations omitted); *Buchanan v. Apfel*, 249 F.3d 485, 491 (6th Cir.2001). Where the claim involves a challenge to an action taken by a municipality, "the focus is on whether there was egregious or arbitrary governmental conduct." *Mettler Walloon, L.L.C. v. Melrose Tp.*, 281 Mich.App. 184, 197 citing *City of Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation*, 538 U.S. 188, 198-199 (2003). "To sustain a substantive due process claim against municipal actors, the governmental conduct must be so arbitrary and capricious as to shock the conscious." *Id*.

The "shock the conscience" standard is meant to convey the degree of arbitrariness which is offensive to the decencies of a civilized society. *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846-847; 118 S.Ct. 1708; 140 L.Ed.2d 1043

(1988)). A state action can be arbitrary and capricious without amounting to a violation of substantive due process. "Not all arbitrary and capricious state action amounts to a violation of substantive due process; otherwise judicial review for compliance with substantive due process would become the equivalent of a typical state or federal Administrative Procedure Act." *Hussein v. City of Perrysburg*, 617 F. 3d 828, 832-33 (6th Cir. 2010) (quoting *Bell v. Ohio State Univ.*, 351 F.3d 240, 251 (6th Cir. 2003)). The interests protected by substantive due process are much narrower than those protected by procedural due process. *Bell, supra* at 249-250. "If any conceivable legitimate governmental interest supports the contested [decision], that measure . . . cannot offend substantive due process norms." *37712, Inc. v. Ohio Dep't of Liquor Control*, 113 F.3d 614, 620 (6th Cir. 1997).

The facts of this case are strikingly similar to those of *Hussein v. City of Perrysburg*, *supra*, where the Sixth Circuit concluded that the denial of a residential driveway does not violate one's substantive due process rights. In *Hussein*, the plaintiffs were issued a "stop work" order for the construction of their driveway, but as winter approached, plaintiffs sought to have a temporary layer of asphalt installed over the top of their otherwise-gravel driveway in order to make it safer. The plaintiffs claimed that they were given verbal permission to proceed with their plan. Nevertheless, while the subcontractor was installing the asphalt, the city inspector arrived with two police officers and threatened litigation unless

the subcontractor ceased asphalt installation and removed what asphalt had already been laid. The plaintiffs subsequently filed suit alleging that defendants violated their substantive due process rights by ordering them to remove the asphalt. The Sixth Circuit dismissed this claim noting:

> ***The asphalt driveway incident did not implicate specific constitutional guarantees, denial of a driveway does not shock the conscience, and an asphalt driveway is not an interest so rooted in the traditions and conscience of our people as to be fundamental. Thus, the defendants did not violate the Husseins' substantive due process rights.***

Id. at 833 [emphasis added].

Similarly, in *Pearson*, *supra*, 961 F.2d 1211, the Court rejected plaintiff's claims against city officials, concluding that the denial of plaintiff's application for a zoning change withstood substantive due process attack. The Court reasoned that "it is extremely rare for a federal court properly to vitiate the action of a state administrative agency as a violation of substantive due process. The vast majority of such attacks may readily be disposed of on summary judgment. . . ."[5] *Id*. at 1222.

[5] Moreover, in *Mongeau v. City of Marlborough*, 492 F.3d 14 (1st Cir. 2007), a developer brought a state-court § 1983 action against the city and city officials following denial of a building permit alleging substantive due process violation. In dismissing the plaintiff's claim, the Court reiterated the "conscious-shocking" standard and further noted that "the substantive due process doctrine may not, in the ordinary course, be invoked to challenge discretionary permitting or licensing determinations of state or local decisionmakers, whether those decisions are right or wrong." *Id*. at 17.

The foregoing cases make clear that Defendants' conduct does not "shock the conscience", nor was it arbitrary or capricious as required for their substantive due process claim to survive. The Sixth Circuit previously addressed this very same issue and unambiguously held that the ***"denial of a driveway does not shock the conscience"***. *Hussein*, at 833. This alone is dispositive and prevents Plaintiffs' substantive due process claim from being submitted to a jury. Moreover, it is important to note that the conduct at issue here is even less "conscious shocking" than the conduct at issue in *Hussein* because the Defendants' here have not denied the construction of the driveway. Rather, Defendants imposed reasonable preconditions in light of Township ordinances and the specific circumstances surrounding the additional fill material brought onto Plaintiffs' property. As acknowledged by Plaintiffs' engineer, it would take him only four (4) hours to complete the additional material requested by the Township engineer at a cost of approximately $720.00.

Plaintiffs have similarly failed to establish that imposing conditions of their driveway construction project deprived them of a particular Constitutional guarantee. Plaintiffs were not denied access to their property. Cf. *Michigan State Highway Comm'n v. Sandberg*, 383 Mich. 144; 174 N.W.2d 761 (1970) ("the right of access ordinarily attaches to property abutting a public highway and the

constitutes a property right[.]"). In this case, the testimony clearly established that Plaintiffs were not denied access to their property by the Defendants. Plaintiffs testified that they had continued access to their property. The impediments to traversing the area of their property from the county road to the house was the result of the accumulation of surface water that was caused by natural causes and exacerbated by the construction activities on the property. Moreover, the Township granted Plaintiffs a temporary occupancy permit specifically to allow occupancy of the home while the fill and grade permit was pending review. Thus the Plaintiffs have presented no evidence that they were ever denied "access" to their property.

Under these circumstances, no reasonable juror could conclude that the Defendants' actions "shocked the conscious". In fact, the case of *Hussein, supra* prevents this finding. Therefore, Plaintiffs have failed to establish a valid claim for a violation of their substantive due process rights and the Defendants are entitled to an order of dismissal.

III. The Individual Defendants Are Entitled to Qualified Immunity

Qualified immunity ensures governmental officials protection "from undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. 800, 806; 102 S.Ct. 2727; 73 L.Ed.2d 396 (1982). Qualified immunity is available for a §1983 claim if the official is "performing

discretionary functions" and his conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id*. at 818. To be clearly established the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Saucier v. Katz*, 533 U.S. 194, 202; 121 S.Ct. 2151; 150 L.Ed.2d 272 (2001), overruled in part on other grounds in *Pearson v. Callahan*, 555 U.S. 223; 129 S.Ct. 808; 172 L.Ed.2d 565 (2009). "Qualified immunity is an immunity from suit rather than a mere defense to liability." *Pearson*, 555 U.S. at 237 [quotations omitted]. "It not only protects a defendant from liability but may also protect a defendant from the burdens of trial and discovery." *English v. Dyke*, 23 F.3d 1086, 1089 (6th Cir. 1994). Accordingly, the Supreme Court has repeatedly "stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227; 112 S.Ct. 534; 116 L.Ed. 2d 589 (1991). When a defendant raises the defense of qualified immunity, the plaintiffs have the ultimate burden of establishing that Defendants are not entitled to qualified immunity. *Everson v. Leis*, 556 F.3d 484, 494 (6th Cir. 2009); *Wegener v. City of Covington*, 933 F.2d 390, 392 (6th Cir. 1991).

The first question in a qualified immunity analysis is whether the facts that the plaintiff has alleged or shown make up a violation of a constitutional right. *Pearson*, 555 U.S. at 232. Second, "the court must decide whether the right at

issue was 'clearly established' at the time of the defendant's alleged misconduct." *Id*. In order for a right to be clearly established "existing case law must clearly and specifically hold that what the officer did—under the circumstances the officer did it—violated the Constitution." *Rudlaff v. Gillispie*, 791 F.3d 638, 641 (6th Cir. 2005). The right must be "beyond dispute," such that "every reasonable officer would have understood that what he is doing violates that right." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015); *White v. Pauly*, 137 S. Ct. 548, 441 (2017). Indeed, the law "must dictate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agency that what defendant is doing violates federal law in the circumstances." *Gragg v. Kentucky Cabinet for Workforce Development*, 289 F.3d 958, 964 (6th Cir. 2002). The Supreme Court has also cautioned that courts must not define the relevant constitutional right in overly-general terms, less they strip the qualified immunity defense of all meaning. *Brosseau v. Hagen*, 543 U.S. 194; 125 S.Ct. 596; 160 L.Ed.2d 583 (2004). Consequently, qualified immunity applies in instances of mistakes of law, mistakes of fact, or mistakes based on mixed questions of law and fact. *Pearson, supra* at 231. Furthermore, for purposes of qualified immunity analysis, a government official cannot be found liable for a constitutional violation absent proof that the individual official was directly responsible for the violation. "Each defendant's liability must be assessed individually based on his or her own

actions." *Pollard v. City of Columbus, Ohio*, 780 F.3d 395, 402 (6th Cir. 2015). This insures "that no defendant is improperly held liable for the conduct of another." *Apsey v. Chester Twp.*, 608 Fed. Appx. 335, 339 (6th Cir. 2015).

In this case, Plaintiffs have not established a violation of a constitutional right. (**See Argument II, *supra***). The Sixth Circuit's holding in *Hussein*, *supra* directly precludes such a finding. Consequently, Plaintiffs have not presented evidence of a violation of a "clearly established" right for purposes of the second prong of the qualified immunity analysis. Indeed, Plaintiffs have failed to point to any pre-existing case law that mandates the conclusion that what Defendants did (imposed preconditions on the construction of a driveway) would be a constitutional violation. Rather, *Hussein*, *supra*, makes clear that the denial of a driveway is not a constitutional violation. On this basis, the individual Defendants are entitled to qualified immunity – a determination for this Court, and not a jury, to make.

IV. Plaintiffs Have Failed to Establish that they are Entitled to Declaratory or Injunctive Relief

Because the Plaintiffs have failed to establish a violation of a constitutional right, or that they are entitled to injunctive or declaratory relief as a matter of law, Defendants are entitled to judgment as a matter of law on Plaintiffs' remaining claims for Declaratory Relief and Judgment and Injunctive Relief. (**See**

Defendants' Response to Plaintiffs' Emergency Motion for Preliminary Injunction, ECF No. 50, Page ID 1136-1487).

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth in this brief, the Defendants' Motion for Judgment as a Matter of Law must be granted and Plaintiffs' Complaint dismissed in its entirety.

Respectfully submitted,

O'CONNOR, DEGRAZIA, TAMM & O'CONNOR, P.C.

BY:/s/ Richard V. Stokan, Jr.

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CERTIFICATE OF SERVICE

Jemmis F. Lawrence states that on July 25, 2019, on behalf of Defendants she served the attached *Motion for Judgment as a Matter of Law, Brief in Support* and *Certificate of Service* upon counsel of record.

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