UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

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

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.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT, AND INCORPORATED BRIEF IN SUPPORT

1. Admitted in part, as Defendants oversimply the Hacks' lawsuit. As set forth in the Hacks incorporated brief in support, in addition to the arbitrary, capricious, and unreasoned requirements imposed on the Hacks pursuant to the October 8 letter ghostwritten by Milford, including requiring the Hacks' property to provide stormwater calculations and accommodate a 10-year storm, the testimony shows that the Defendants, for the first time, imposed a "fill and grade" on a driveway, disregarded facts in imposing requirements on the Hacks, and concealed information that undermined Defendants' pretext

for imposing requirements on the Hacks. The Ordinances nowhere identify a "fill and grade permit," and Defendants cannot identify a single Milford resident who has been required to undergo this process to build a driveway for a single-family detached residential home. Defendants' actions deprived the Hacks of an enumerated Constitutional right: deprivation of property without due process, specifically the right of ingress and egress to their home and property. The Hacks *separately* allege that Defendants violated the Hacks' substantive due process rights by imposing safety hazards on the Hacks, including by obstructing the Hacks' and emergency vehicle's ability to enter and leave the Hacks' property. Both the access issue and the safety issue were pled in the Hacks' Complaint as due process violations. *Complaint* at ¶¶ 79-81.

2. Admitted.

3. Admitted only that the Court issued an Opinion and Order on June 3, 2019. The Hacks deny the balance of this Paragraph.

4. Admitted.

5. Admitted only that Defendants move pursuant to Fed. R. Civ. P. 50(a) and denied that Defendants are entitled to their requested relief.

6. Denied.

7. Denied. Answering further, the Court previously rejected this argument on July 17, 2019. (Dkt. No. 143.) Answering further, Defendants mistakenly rely on the legally

and factually inapplicable cases of *Buchanan* and *Hussein*. Neither Buchanan nor Hussein involve enumerated, particularized Constitutional rights, or fundamental rights.

Buchanan involved SSI benefits, which are not subject to review by the Courts on both statutory and jurisdictional grounds. *Buchanan v. Apfel*, 249 F.3d 485, 491 (6th Cir. 2001), *citing McCarthy v. Sec'y of Health & Human Servs.*, 793 F.2d 741, 742 (6th Cir. 1986) ("Because Mr. Clark's [SSI] benefits were awarded at the administrative level, only the Secretary may determine the amount of and grant attorney fees. . . . Moreover, the federal courts are **without jurisdiction** to review the amount of the legal fees awarded by the Secretary.").

Hussein is likewise legally and factually inapplicable to this case. The *Hussein* case does not discuss the right of access once, nor is there any citation to Michigan caselaw establishing a property right to access to one's property and home. *See Michigan State Highway Comm'n v. Sandberg*, 383 Mich. 144; 174 N.W.2d 761 (1970); *Horton v. Williams*, 99 Mich. 423; 58 N.W. 369 (1894). From a legal perspective, this makes good sense, since *Hussein* did not involve Michigan law but rather Ohio law. From a factual perspective, this also makes good sense, since at no point in time were the Husseins actually deprived access to their property or home. The Husseins, in fact, had access to their home and property via "a gravel driveway." *Hussein v. City of Perrysburg*, 617 F.3d 828, 831 (6th Cir. 2010). The Husseins nonetheless wanted to upgrade to an "asphalt driveway." *Id.* The Husseins did not allege, and there was no evidence showing, that the Husseins lost access

to their property or home. Thus, under the facts and law presented in *Hussein*, "the asphalt driveway incident did not implicate specific constitutional guarantees," "shock the conscience," or offend traditions and conscience of our people as to be fundamental. *Hussein*, 617 F.3d at 833.

8. Denied. Answering further, on July 17, 2019, the Court denied Defendants' Second Motion for Summary Judgment, including rejecting Defendants' arguments on the issues of governmental immunity and qualified immunity. (Dkt. No. 143.)

9. Denied that it would be improper to submit the individual liability claims to the jury and denied that the factual questions raised in this case and at trial are for the Court to determine. Answering further, the Court previously disposed of Defendants' immunity claims, and at the trial stage it is appropriate and indeed required that the jury determine whether Defendants Green and Brandt unconstitutionally deprived the Hacks of their substantive due process rights and whether Defendants Green and Brandt violated 42 U.S.C. § 1983 by depriving the Hacks of those rights acting under color of state law.

10. Denied. The Hacks have provided sufficient evidence from which a jury could reasonably conclude that both Brandt and Green arbitrarily and capriciously deprived the Hacks of their Constitutional right to ingress and egress from the Hacks' home and property and violated 42 U.S.C. § 1983, thereby disqualifying Brandt and Green from the privilege of qualified immunity.

11. Denied.

12. Denied.

ACCORDINGLY, the Court should deny Defendants' Motion in full and allow Plaintiffs' case to be decided by the jury.

Respectfully submitted,

/s/ R.J. Cronkhite
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Dated: July 26, 2019

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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

Plaintiffs,

Case No.: 2:18-cv-13330
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 PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT

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QUESTIONS PRESENTED

1. Is there legally sufficient evidence by which a reasonably jury could find in favor of Plaintiffs?

Plaintiffs answer: "Yes."

Defendants answer: "No."

2. May this Court enter injunctive or declaratory relief based on factual findings by the jury?

Plaintiffs answer: "Yes."

Defendants answer: "No."

CONTROLLING OR MOST APPROPRIATE AUTHORITY

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

Michigan State Highway Comm'n v. Sandberg, 383 Mich. 144; 174 N.W.2d 761 (1970)

Horton v. Williams, 99 Mich. 423; 58 N.W. 369 (1894)

Whaley v. Cty. Of Tuscola, 58 F.3d 1111, 1113–14 (6th Cir. 1995)

Valot v. Se. Local Sch. Dist. Bd. Of Educ., 107 F.3d 1220 (6th Cir. 1997)

Bell v. Ohio State Univ., 351 F.3d 240 (6th Cir. 2003)

Johnson v. City of Cincinnati, 310 F.3d 484 (6th Cir. 2002)

Braun v Ann Arbor Charter Twp, 519 F.3d 564 (6th Cir. 2008)

Cty. Of Sacramento v. Lewis, 523 U.S. 833, 849; 118 S. Ct. 1708 (1998)

Gaspers v. Ohio Dep't. of Youth Servs., 648 F.3d 400 (6th Cir. 2011)

Pearson v. City of Grand Blanc, 961 F.2d 1211 (6th Cir. 1992).

SUMMARY

Defendants' current motion merely reiterates their Second Motion for Summary Judgment, which this Court denied on July 17, 2019, including on the issues of municipal and qualified immunity. The Court concluded at that time that the totality of the circumstances created genuine issues of material facts for trial.

Defendants jumble the applicable law and misstate the standard of liability. As demonstrated in a case cited by Defendants—*Hussein v. City of Perrysburg*— there are three theories giving rise to substantive due process violations: 1) deprivation of specific constitutional guarantees; 2) conduct that shocks the conscience; and 3) deprivation of "an interest so rooted in the traditions and conscience of our people as to be fundamental." *Hussein v. City of Perrysburg*, 617 F.3d 828, 833 (6th Cir. 2010). Each theory independently gives rise to liability. And, at trial, the Hacks submitted ample evidence supporting each theory.

The Hacks have a specific right to effective access to their home and property. *Michigan State Highway Comm'n v. Sandberg*, 383 Mich. 144, 149; 174 N.W.2d 761, 764 (1970); *Horton v. Williams*, 99 Mich. 423, 428–29, 58 N.W. 369, 371 (1894).

The Hacks also have a fundamental right to safe and effective access to and from their home and property. The Sixth Circuit recognizes that "the Constitution protects a right to travel locally through public spaces and roadways." *Johnson v. City of Cincinnati*, 310 F.3d 484, 498 (6th Cir. 2002). "[T]he right to travel locally through public spaces and

roadways is essentially **a right of access**." *City of Cincinnati*, 310 F.3d at 503 (emphasis added). There is also a fundamental right to be free from state-created dangers. *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998). Denial of emergency and law enforcement access to the Hacks' property contravened this fundamental right.

Liability arises where a governmental actor deprives these specific and fundamental rights in an arbitrary and capricious manner, meaning that the action is "willful and unreasoning action, without consideration and in **disregard of the facts** or circumstances of the case." *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1221 (6th Cir. 1992). "Asserted denial [of substantive due process] is to be tested by an appraisal of the totality of facts" *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 850; 118 S. Ct. 1708, 1719, 140 L. Ed. 2d 1043 (1998).

Reasonability in light of the totality of the circumstances is the touchstone of the Hacks' substantive due process claims. At trial, the Hacks introduced over 120 trial exhibits and presented trial testimony from ten witnesses from which the jury could reasonably find that Defendants: 1) acted unreasonably; 2) violated 42 U.S.C. § 1983; and 3) deprived the Hacks of their substantive due process rights on three different theories: through arbitrary and capricious conduct, through conduct that shocks the conscience, and through deprivation of fundamental rights.

STANDARD

The standard of review of a motion for judgment as a matter of law pursuant to Fed.

R. Civ. P. Rule (50)(a) is to view the evidence in the light most favorable to the nonmoving party, giving that party the benefit of all reasonable inferences. *Jackson v. Quanex Corp*., 191 F.3d. 647, 657 (6th Cir. 1999). A district court may not weigh the evidence or make credibility determinations because these are functions for the jury. *Id.* If the nonmovant presents sufficient evidence to raise a material issue of fact for the jury then dismissal is improper under Rule 50(a). *Id.* "[W]henever there is a complete absence of pleading or proof on an issue material to the cause of action or when no disputed issues of fact exist such that reasonable minds would not differ," only then is it appropriate to take the case away from the jury. *O'Neill v. Kiledjian*, 511 F.2d. 511, 513 (6th Cir. 1975).

"Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [their] favor." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). "'Only when it is clear that reasonable people could come to but one conclusion from the evidence should a court grant a motion for directed verdict.'" *Hill v. McIntyre*, 884 F.2d. 271, 274 (6th Cir. 1989) quoting *Coffy v. Multi-County Narcotics Bureau*, 600 F.2d. 570, 579 (6th Cir. 1979). As a basic guide the federal procedural rules advises, "'If there is conflicting testimony on a material issue, the court may not grant a directed verdict . . . because it believes one witness and does not believe another.'" *Id.* quoting Wright & Miller, 9 Federal Practice and Procedure § 2527, at

560 (1971).

ARGUMENT

A. A reasonable jury could conclude that defendants deprived the Hacks of their substantive due process rights under all three theories of liability: deprivation of a specific Constitutional guarantee, deprivation of a fundamental right, and conduct that shocks the conscience.

The Fourth Amendment and Fourteenth Amendments of the U.S. Constitution, as well as Art. I, § 17 Michigan Constitution, prohibit the government from depriving a citizen "of life, liberty, or property, without due process of law." Asserted denial [of substantive due process] is to be tested by an appraisal of the totality of facts" *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 850; 118 S. Ct. 1708, 1719, 140 L. Ed. 2d 1043 (1998).

In the 1997 case of *Valot*, the Sixth Circuit laid out two "loose" categories of substantive due process claims: "(1) deprivations of a particular constitutional guarantee; and (2) actions that "shock the conscience." *Valot v. Se. Local Sch. Dist. Bd. Of Educ.*, 107 F.3d 1220, 1228 (6th Cir. 1997).

Later, in *Bell v. Ohio State Univ.*, 351 F.3d 240, 249–50 (6th Cir. 2003), the Sixth Circuit clarified these two "loose" categories by recognizing the three circumstances giving rise to substantive due process violations:

1. Actions that deprive a specific constitutional guarantee;
2. Actions that shock the conscience; and
3. Actions that deprive certain interests that "the Supreme Court has found so rooted in the traditions and conscience of our people as to be fundamental,"

including the "right to travel locally through public spaces and roadways"). *Bell*, 351 F.3d at 249–50 (emphasis added), citing *Johnson v. Cincinnati,* 310 F.3d 484, 495–98 (6th Cir. 2002).

Citizens have a substantive due process right "not to be subjected to arbitrary or irrational zoning decisions." *Pearson v. Grand Blanc,* 961 F.2d 1211, 1217 (6th Cir.1992). "To state a substantive due process claim in the contest of zoning regulations, a plaintiff must establish that (1) a constitutionally protected property or liberty interest exists, and (2) the constitutionally protected interest has been deprived through arbitrary and capricious action." *Braun v Ann Arbor Charter Twp,* 519 F.3d564, 573 (6th Cir. 2008).

1. A reasonable jury could find that Defendants unlawfully deprived the Hacks of their particular Constitutional guarantee to ingress to, and egress from, their property and home.

The Hacks have a specific Constitutional guarantee to ingress and egress from their property and home, and Defendants unlawfully deprived them of it.

"The existence of a property interest for due process purposes depends in large part on state law." *Whaley v. Cty. Of Tuscola*, 58 F.3d 1111, 1113–14 (6th Cir. 1995); *Bd. Of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972) ("Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.").

As long recognized by the Michigan Supreme Court, the Hacks' particular Constitutional property right includes ingress and egress to their home and property from the public streets: "Right of access ordinarily attaches to property abutting a public highway and that this constitutes a property right is not disputed by plaintiff and must be accepted as long having been the law in Michigan." *Michigan State Highway Comm'n v. Sandberg*, 383 Mich. 144, 149; 174 N.W.2d 761, 764 (1970). Such right of access "is not a license merely, but an easement appurtenant to and running with the land." *Horton v. Williams*, 99 Mich. 423, 428–29, 58 N.W. 369, 371 (1894). Indeed, the Michigan Supreme Court has held that legislative bodies have no more right to deprive a property owner's access to the street than to "the lot itself." *Horton*, 99 Mich. at 429.

Where a substantive due process attack is made on state administrative action, a plaintiff must show that the state administrative agency has been guilty of "arbitrary and capricious action", meaning that the action is "willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case." *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1221 (6th Cir. 1992).[1]

Here, a reasonable jury could conclude that Defendants acted unreasonably, "in disregard of the facts."

[1]Governmental action is considered administrative, as opposed to legislative, "when a relatively small number of persons are affected on individual grounds," which is the case here. *Pearson*, 961 F.2d at 1220.

The record is clear that the Hacks did not have effective access to their property and home for substantial periods of time.

- The Hacks and their builder, Bill Rogers, testified that they could not access the property and home by vehicle due to flooding conditions.
- Pictures corroborate the severe flooding conditions.
- Defendants Brandt and Green acknowledged the severe flooding conditions and access problems.
- Third-party USPS documented the fact that it could not access the home due to flooding conditions on the property.

The record is clear that the loss of access was due to Defendants' conduct.

- The Hacks' agent, Bill Rogers, testified that he was attempting to complete the driveway by bringing the necessary driveway material on site at the time he received a cease and desist letter from Defendants Brandt and Milford.
- Defendant Brandt acknowledged that the cease and desist prevented further material from being brought on site despite knowing that the driveway would need to be elevated in order to be functional.
- The record demonstrates that Milford's engineer, Michael Darga, approved the Hacks' plan to complete their driveway and manage the water on their property so that they could access their property and home. Afterward, Defendants Green and the Milford Board first voted to first table their

engineer's approval, then reversed their engineer, and finally required the Hacks to satisfiy never-before-seen requirements before the Hacks could implement their plan and have access to their property and home.

There is ample evidence enabling a reasonable jury to conclude that Defendants took "willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case."

- The mere fact that the Defendants subjected the Hacks to a never-before-seen process to build a driveway—including applying Milford Ordinance 32-583 to a residential driveway, requiring engineered plans, stormwater calculations, a drainage area map, and accommodation of a 10-year storm—would allow a reasonable jury to conclude Defendants were unreasonable. Testimony from LaVanway, Darga, Rogers, Brandt, and Green demonstrate that, over literally thousands of projects, such requirements had never been imposed upon a homeowner for a residential driveway. Timothy Brandt testified that he exclusively relied on Milford Ordinance Sec. 32-583 to justify the cease and desist letter, and that he had never applied the Ordinance to a driveway before. Brandt also testified that building a driveway is part of the building permit and that he does not apply 32-583 to other materials brought on site to implement the building permit plan, such as foundation sand and septic field sand. This is coupled with evidence that Milford Ordinance Sec.

32-586 specifically exempts single-family detached residences from a review process involving drainage requirements and stormwater calculations.

- Defendant Brandt and Defendant Green's testimony show both were involved in the decision to issue the June 2018 cease and desist that stopped completion of the Hacks' driveway and management of their water. Green testified that Brandt conferred with Green on the cease and desist letter **before** it was sent; this constitutes a ratification of Brandt's conduct. Thee record shows that Defendant Brandt approved a plot plan calling for a driveway and that he knew at the time of approval that a driveway was required, and that the particular driveway on the Hacks' lot would need to be elevated to allow the Hacks' access to their property and home. Brandt nonetheless decided to stop completion of the driveway. While Brandt claims he did not know the material was for the driveway, the record shows that Brandt reviewed Boss Engineering's plan which depicted material being used to create the functional driveway. Brandt's testimony is also not credible based on the fact that he knew of the severe flooding situation on the Hacks' front law, that the driveway would need to be elevated, that dirt would need to be used to keep an elevated driveway intact, and that the dirt piles were placed alongside the driveway.

- The record shows that Defendants' sole basis for imposing the October 8, 2018 requirements were based on complaints received from David Mamo in which Mamo claimed that the Hacks' construction had flooded his property. However, Brandt and Ordinance Enforcement Officer Bozynski testified that they both looked into Mamo's claims and could not corroborate them despite over 20 site visits by Brandt and despite Bozynski visiting the Mamo's property **three times** (according to Green) and concluding heavy rainfalls were attributable to any flooding on Mamo's property. The record also shows that Supervisor Green was aware that both Brandt and Bozynski had failed to corroborate Mamos' claims despite these multiple attempts. The record also shows that Green and Brandt had been advised by Rogers that Mamo's claims were false, including an allegation that the Hacks' home had been raised six feet. Despite Brandt and Green knowing these facts, Brandt and Green failed to share the information through the process involving review and approval of the Hacks' driveway and water retention pond, including during the September 2018 Milford Board Meeting and the October 2018 Milford Board Meeting. At trial, neither Brandt nor Green could articulate any intelligible explanation for failing to disclose this information at pertinent junctures of the process, including during the September 2018 Board Meeting and the October 2018 Board Meeting at which Green attended and at which

Brandt's wife, Board Member Holly Brandt, attended. Green also testified that he voted to table the Hacks' plan in September of 2018 and then voted to impose the additional requirements added in October of 2019. This failure to share information directly undercutting the Milford Board's decision to first delay and then reverse their engineer's approval permits a reasonable jury to conclude that Defendants acted arbitrarily and capriciously, including "in disregard of the facts" that Brandt and Green were well aware of at the pertinent times.

- The record shows that Milford intervened to direct their own professional engineer to "re-review" and reverse his recommendation that the Hacks' proposed driveway plan be unconditionally approved. Darga testified that reversal constitutes the first reversal in Darga's 20-year career and the first reversal in Milford history. As part of the reversal, Green, Brandt, Milford Attorney Jennifer Elowsky, and Milford Board Member Mazzara met with Darga, after which Milford imposed never-before-seen requirements on the Hacks as part of the approval process for their functional driveway. The record shows that, for the first time in Darga's career, someone else wrote his re-review letter containing these requirements. Darga testified at trial as to why these conditions were required but did so in contradiction of his deposition testimony, during which he admitted that Milford had told Darga it

> wanted information regarding other parts of the Hacks' parcel, including north of their home—at which time Darga told them such information was immaterial to consideration and approval of Mr. LaVanway's proposed plan for the driveway and retention pond. Milford nonetheless insisted that the Hacks meet these requirements to prove that they had "no impact" on the Mamos' property. Again, Darga was never informed by Brandt or Green that Mamo's claim had been thoroughly investigated and debunked.

The above are highlights in a record that fully enables a reasonable jury to conclude, based on the totality of the circumstances, that Defendants' actions were arbitrary and capricious both in the sense that they were unreasoning and in the sense that they shocked the conscience.

The Sixth Circuit routinely reverses entries of directed verdicts in situation where credibility questions or the totality of the circumstances enable a jury to reasonably find for the non-movant.

In *Jackson v. Quanex Corp*., 191 F.3d. 647 (6th Cir. 1999), the Sixth Circuit reversed the district court's entry of judgment in favor of defendant pursuant to Rule 50(a). *Jackson*, 191 F.3d at 660. The Sixth Circuit found that the district court had failed to consider the totality of the circumstances, and that a reasonable jury, in light of "all of the circumstances," could have reasonably found in favor of plaintiff. *Id.*

In *Hill v. McIntyre*, 884 F.2d. 271 (6th Cir. 1989), the Sixth Circuit reversed the district

court's entry of judgment in favor of defendant pursuant to Rule 50(a), finding that a reasonable jury could find that defendant's testimony regarding his decision-making was false despite defendant offering a competing narrative. *Id*. at 277.

2. A reasonably jury could conclude that Defendants' conduct unreasonably deprived the Hacks of their fundamental right to safe and effective access to their home and property, as well as emergency and police officer access to their home and property.

The Hacks have a fundamental right to safe and effective access to and from their home and property. The Sixth Circuit recognizes that "the Constitution protects a right to travel locally through public spaces and roadways." *Johnson v. City of Cincinnati*, 310 F.3d 484, 498 (6th Cir. 2002). "[T]he right to travel locally through public spaces and roadways is essentially **a right of access**." *City of Cincinnati*, 310 F.3d at 503 (emphasis added).

"In analyzing whether a particular right implicates the protection of the Due Process Clause, we first carefully define the asserted right and then ask whether it is "deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Johnson v. City of Cincinnati*, 310 F.3d 484, 495 (6th Cir. 2002). State citizens "possess[] the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, **to move at will from place to place therein**, and to have free ingress thereto and egress therefrom." *City of Cincinnati*, 310 F.3d at 497 (emphasis added). Further, "the tremendous practical significance of a right to localized travel also strongly suggests that such a right is secured by substantive due process." *City of Cincinnati*, 310 F.3d at 498.

There is also a fundamental right to be free from state-created dangers. *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998). "Liability under the state-created-danger theory is predicated upon affirmative acts by the state which either create or increase the risk that an individual will be exposed to private acts of violence."

Here, a reasonable jury could conclude that Defendants acted unreasonably and deprived the Hacks of their substantive due process rights by imposing safety hazards on the Hacks, including obstructing the Hacks' and emergency and police vehicle's ability to enter and leave the Hacks' property.

3. A reasonable jury could conclude that Defendants' conduct "shocked the conscience".

Even where non-specific, non-fundamental rights do not exist, the government may still violate substantive due process provided that the government's conduct "shocks the conscience." Many things may "shocks the conscience", such as deliberate indifference or extreme irrationality in decision-making that affects the Hacks' rights. *Pearson*, 961 F.2d at 1222 (extreme irrationality); *Darrah v. City of Oak Park*, 255 F.3d 301, 306 (6th Cir. 2001) (deliberate indifference).

Here, a jury could reasonably be shocked by Defendants' actions and omissions imposing safety hazards on the Hacks and depriving them of effective access to their home, property, and roadway.

B. A reasonable jury could conclude that Defendants violated 42 U.S.C. § 1983 by acting under color of state law to deprive the Hacks of their constitutional right to safe, effective access to their property and home.

42 U.S.C. § 1983 prohibits Defendants, acting pursuant to an ordinance or other state law, from depriving the Hacks of their constitutional right to safe and effective access to their property and home, as well as emergency vehicle access to the same. claim that the Defendants—acting pursuant to an ordinance—deprived the Hacks of their right to safe, effective access to and from their home.

The record confirms Defendants acted under state law, specifically Milford Ordinance 32-583, to both issue the June 2018 cease and desist and later to impose the October 8, 2018 requirements.

As outlined above, a reasonable jury could conclude that Defendants violated 42 U.S.C. 1983, acting under color of state law, when they arbitrarily and capriciously deprived the Hacks of their right to safe, effective access to and from their property, deprived the Hacks right to travel to the local roads from their home, and deprived the Hacks' access to emergency and law enforcement personnel.

C. Defendants Green and Brandt are not entitled to qualified immunity.

On July 17, 2019, the Court disposed of this argument and found that a fact issue exists as to whether Defendants Green and Brandt acted unlawfully.

The Sixth Circuit follows a three-step analysis when determining whether qualified immunity applies to a municipal officer or employee. *Gaspers v. Ohio Dep't. of Youth*

Servs., 648 F.3d 400, 412 (6th Cir. 2011). First, the Court determines whether, "based upon the applicable law, the facts viewed in the light most favorable to the plaintiff show that a constitutional violation has occurred." *Holzemer v. City of Memphis*, 621 F.3d 512, 519 (6th Cir. 2010). Second, the court determines whether the violation involved a clearly established constitutional right of which a reasonable person would have known. *Id.* Third, the court considers "whether the plaintiff has offered sufficient evidence 'to indicate that what the official allegedly did was objectively unreasonable in light of the clear established constitutional rights.'" *Id.* While conducting this review, the court views the facts in the light most favorable to the plaintiff. *Siggers-El v Barlow*, 412 F3d 693, 699 (6th Cir. 2005). Once the defense of qualified immunity is raised, a plaintiff must identify acts that, when committed violated clearly established law. *Dominque v. Telb*, 831 F.2d 673, 677 (6th Cir. 1987). The source for such determination is found in constitutional, statutory or case law existing at the time of the alleged violation. *Telb*, 831 F.2d at 677. The Hacks have clearly identified their Constitutional right to ingress, egress, and safe access to their property. The Hacks have also identified the right to access and travel the public roadways. *Johnson v. City of Cincinnati*, 310 F.3d at 498.

The Hacks have also demonstrated above that Defendants deprived them of their right to ingress and egress from their home, as well as by imposing safety hazards on the Hacks. The Hacks right to ingress and egress to their Home and property has been established for over a century. Their § 1983 rights, too, have been long-established. *See*

Cannon v. Bernstein, No. 09-14058, 2013 WL 5449087, at *3 (E.D. Mich. Sept. 30, 2013) (Hood, C.J.) (denying defendants' claim of qualified immunity, noting that the applicable law, 42 U.S.C. § 1983, "has long been in existence."). The Sixth Circuit recognized the right to access and travel through local public roads nearly twenty years ago. *Johnson v. City of Cincinnati*, 310 F.3d at 498.

"If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct." *Harlow*, 457 U.S. at 818–19. Defendants ignore the Hacks' well-established property and § 1983 rights and instead argue that "Plaintiffs cannot point to any pre-existing case law that mandates [requiring] a fill and grade permit pursuant to ordinance[] would constitute a constitutional violation."[2] Dkt. No. 52 at Pg. ID 1519. Both the Supreme Court and the Sixth Circuit have predicted and preempted this sort of self-serving exactness: "[t]his is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Wilson v. Layne,* 526 U.S. 603, 615, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999). Accordingly, "a public official could still be on notice that [his] conduct violates established law even in novel factual circumstances." *Holzemer v. City of Memphis*, 621 F.3d 512, 527 (6th Cir. 2010).

[2] Milford's voluminous Ordinances do not include a "fill and grade permit"; Defendants have never provided a single Ordinance to the contrary. So rare are these "fill and grade" permits that Supervisor Green, Darga, and Brandt testified could not remember a single other time they were required for a residential driveway.

There is sufficient evidence for a jury to conclude that Brandt's and Green's conduct was objectively unreasonable. *See Zumbroegel v. City of Dearborn Heights*, 705 F. Supp. 358 (E.D. Mich. 1989) (denying municipal officer's motion for summary judgment on the basis of qualified immunity because "the plaintiff has presented facts which if true would constitute a violation of [a constitutional] right." *Zumbroegel*, 705 F. Supp. at 363.[3] Brandt issued a cease and desist letter not only cutting off the Hacks' access to their property but also interfering with access to the road and interferes with emergency vehicles getting to and from the home based on the severe water conditions. Brandt himself acknowledged all of these facts. Brandt did so without even bothering to confirm the dirt was for the very thing that Brandt himself ordered constructed, a driveway—knowing the lack thereof would cause safety issues. *Id.* at p. 110:17-20. And he did so knowing the driveway needed to be elevated.

Meanwhile, the testimony amply demonstrates that Green was personally involved in the water issues at the Hacks property dating back to February 2018, when Mamo personally reached out to Green to ask for his intervention. Green testified he was involved in the process of investigating whether the Hacks were violating any ordinance, including by flooding the Mamos' property, that Green was aware Code Enforcement Officer Bozynski investigated the situation, and that Bozynski concluded that there was no ordinance

[3] The Court, after "construing the allegations in a light most favorable to the plaintiff," also rejected the argument that the municipal officer was entitled to summary judgment because the officer's "conduct, as alleged by the plaintiff, does not 'shock the conscience' and violate substantive due process." *Zumbroegel*, 705 F. Supp. at 363-66.

violation because the water on the Mamos' property was from heavy rainfall rather than the Hacks. Bozynski personally told Green about these conclusions. Green asked him how he came to these conclusions, and Bozynski reported that he did not find anything to corroborate Mamos' claims. Green acknowledged that Mamo kept on emailing the same complaint about water coming on his property from the Hacks, and that Green concluded it was from that season's heavy rainfall, as Bozynski had concluded. Green also testified that after investigation, Milford concluded Mamo had inaccurately claimed the Hacks had raised their home six feet and did not find credible Mamo's claim of "soil contamination."

Green was aware of the amount of water on the Hacks' property given that he personally saw the photographs of substantial flooding on the Hacks' property. Despite Green knowing of the risks facing the Hacks and that the Mamos' claims were unfounded, Green voted to "table" approval of the Boss Plan. Green then later directed and approved the arbitrary and capricious requirements in the ghost-written October 8 letter. Green did so despite acknowledging that Mamo's complaints had already been investigated and dismissed; that the Hacks had committed no code violations based on Mamos' complaints; and that Mamo had presented no new information on which to change or rebut Bozynski's conclusions. Green testified he decided not to inform the Board of Bozynski's investigation into these same issues and conclusions that directly contradicted Mamos' presentation to the Board. This withholding of information that directly rebutted the pretext for halting completion of the Hacks driveway is unreasonable and in disregard of the facts.

D. The jury could reasonably make factual findings enabling the Court to grant the Hacks' injunctive and declaratory relief.

As the Court recognized on July 14, 2019, the Court is empowered to award equitable relief, such as injunctive and declaratory relief, based on factual findings of the jury. Here, the jury can reasonably conclude that Defendants acted unreasonably and imposed unreasonable requirements on the Hacks as part of their driveway construction. If so, Milford Ordinance 32-583 is completely inapplicable or, in the alternative, the requirements imposed pursuant to that Ordinance be not be "appropriate" as required by that Ordinance. In such circumstances, this Court may enter injunctive and declaratory relief authorizing the Hacks to implement their engineered plans to complete their driveway and build a retention pond.

CONCLUSION

ACCORDINGLY, the Court should deny Defendants' Motion in full and allow Plaintiffs' case to be decided by jury.

Respectfully submitted,

/s/ R.J. Cronkhite

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Dated: July 26, 2019

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2019 electronically filed the above document(s) with the Clerk of the Court using the ECF system, which will send notification of such filing to those who are currently on the list to receive e-mail notices for this case.

DATED: July 26, 2019 /s/ R.J. Cronkhite