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.

THE HACKS' OPPOSITION TO DEFENDANTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, MOTION FOR NEW TRIAL, AND MOTION FOR REMITTITUR

1. Admitted in part, as Defendants oversimply the Hacks' lawsuit.

2. Admitted. Answering further, Defendants in their latest Motion have principally re-raised, without cause, the identical issues previously ruled on by this Court—at substantial cost to the Hacks in the form of attorney's fees.

3. Admitted.

4. Admitted only that Defendants now renew their Motion for Judgment as a Matter of Law, move for a new trial, and request remittitur.

5. Admitted.

ACCORDINGLY, the Court should deny Defendants' Motion in full.

Respectfully submitted,

/s/ R.J. Cronkhite

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Dated: September 24, 2019

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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 THE HACKS' OPPOSITION TO DEFENDANTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, MOTION FOR NEW TRIAL, AND MOTION FOR REMITTITUR

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QUESTIONS PRESENTED

1. Do the proofs show that reasonable minds could disagree with Defendants, as the Jury did in this case, barring judgment as a matter of law?

The Hacks answer: "Yes."

Defendants answer: "No."

2. Was there a seriously erroneous result, thus warranting a new trial?

The Hacks answer: "No."

Defendants answer: "Yes."

3. Was the Jury award clearly excessive, thus warranting remittitur?

The Hacks answer: "No."

Defendants answer: "Yes."

CONTROLLING OR MOST APPROPRIATE AUTHORITY

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

Fed. R. Civ. P. 59

Szeinback v. Ohio State Univ., 820 F.3d 814, 820 (6th Cir. 2016)

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)

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)

SUMMARY

This is Defendants' fourth Motion seeking dismissal of Plaintiffs Joel Q. Hack and Wren Beaulieu-Hack's ("the Hacks") claims and entry of a judgment in Defendants' favor. Defendants' Motion is thus mostly repetitious; Defendants brought nearly the identical Motion after close of the Hacks' proofs. The Court denied that Motion. Afterward, at trial, Defendants presented no new evidence and introduced one witness in their defense, David Mamo, whose testimony definitively undercut Defendants' pretext for depriving the Hacks of their constitutional right to access their property. Defendants' only new arguments involve a request for a new trial and remittitur.

The Hacks have a particular and fundamental Constitutional right to effectively access their 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). Substantive due process 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; 140 L. Ed. 2d 1043 (1998).

At trial, the Hacks introduced over 120 trial exhibits and presented trial testimony from which the jury reasonably found that Defendants acted unreasonably in depriving the Hacks access to their property, thereby violating the Hacks' substantive due process rights under three different theories: through arbitrary and capricious conduct, through deprivation of fundamental rights, and through conduct that shocks the conscience. The Court should deny Defendants' renewed motion for judgment as a matter of law because reasonable minds could disagree with Defendants, as the Jury did. *Radvansky v. City of Olmsted Falls,* 496 F.3d 609, 614 (6th Cir. 2007).

Remittitur is inappropriate because the Jury's verdict is supported by the proofs and because the Jury did not award a "clearly excessive" amount in damages. *Fuhr v. Sch. Dist. of City of Hazel Park,* 364 F.3d 753, 761 (6th Cir. 2004). The Jury's verdict on compensatory damages is supported by the Hacks' substantial trial evidence supporting their economic and non-economic damages, including the personal testimony of the Hacks, medical letters, and the testimony of Dr. Bernie Les. (**Tr. Exs. P 125 and 126**.) The Jury's $206,000 verdict on punitive damages is proportional to the Jury's $194,000 verdict for compensatory damages and proportional to the reprehensibility of Defendants' misconduct. *Romanski v. Detroit Entm't, L.L.C.*, 428 F.3d 629, 643.

A new trial is inappropriate because there was not a seriously erroneous result. *Holmes v. City of Massillon, Ohio,* 78 F.3d 1041, 1045-46 (6th Cir. 1996). Defendants make no substantive argument on this point and fail to identify any error warranting a new trial.

PERTINENT FACTS

On June 13, 2016, the Hacks purchased a vacant 3.15-acre parcel of land located in the Charter Township of Milford, commonly known as 2610 Pearson Road, Milford Township, Michigan, 48380 (the "Property"). The Property had previously been vacant and unimproved, and was subject to flooding. The Hacks retained EBI, Inc. ("EBI") and its owner, William Rogers, to construct a single-family detached residential home on the Property. In November of 2017, EBI, in compliance with Milford's ordinances, submitted to Milford the Hacks' building permit application for a single-family detached residence. The application included an approved plot plan, with a 10-12 foot wide, 380 foot long driveway ("Plot Plan"). (**Tr. Ex. P 48**.) The Hacks' approved plot plan includes a driveway. *Id.* At trial, Milford Building and Zoning Administrator Timothy Brandt ("Brandt") testified that his office looked at the entire plot plan submitted along with the building permit application, and that the Building Department understood that the permit application would construct the project as depicted in the Plot Plan. Building Administrator Brandt testified that he knew that the Hacks' property on which the driveway was proposed was usually under water and knew that the Hacks would need to place material under the driveway to construct a useable driveway.

On November 13, 2017, Milford, through Brandt, approved the plot plan and issued the Hacks a Building Permit. With the above knowledge regarding the Property's water

conditions, Brandt directed the Hacks as follows: "A driveway shall be installed and maintained at all times for safe ingress and egress of emergency vehicles." (**Tr. Ex. P 111**.)

Construction then began only after issuance of the duly-issued building permit and Brandt's Plan Review directions. Green and Brandt testified that, shortly after construction began, Neighbor David Mamo contacted and emailed Brandt and Green, claiming the Hacks' construction was diverting water on his property and causing flooding. (**Tr. Ex. P 73-1**.) A week later, Mamo emailed pictures of the alleged flooding to Milford Ordinance Officer Bozynski and Mamo's long-time friend, Supervisor Donald Green. Ordinance Officer Bozynski, at the direction of Brandt and Green, visited the Mamos' property in February of 2018 to investigate the alleged water problems and violations. (**Tr. Ex. P 72**.) Bozynski found no ordinance violations when he visited the Mamos' property; Bozynski concluded that any flooding was due to an "incredible rainfall". *Id.* at p. 12:8-22. Bozynski wrote a report regarding his investigation. (**Tr. Ex. P 128**.). The report confirmed Bozynski's conclusions that there was no water spilling over onto the Mamos property from the Hacks: "The area recently suffered a 4-inch rain storm, which in part led to the flooding . . . This water doesn't appear to be spilling onto [the Mamos'] property." *Id.* The Hacks introduced evidence at trial that 2018 was the 4th wettest year in the area since the 1870s, and that February of 2018 was particularly wet. (**Tr. Ex. P 67 and 68.**) As indicated in Bozynski's report—and as testified to by Bozynski, Green, and Brandt—Bozynski informed both Brandt

In June of 2018, EBI proceeded with construction of the driveway as set forth in the

Building Plans and as authorized by the Building Permit. Specifically, EBI directed that a nominal amount of earth be placed underneath and along the sides of driveway to build the sides of the driveway. Brandt testified that it would be necessary to build the sides of the driveway up in order to hold the driveway together. To carry out the Building Plans and the driveway dimensions therein, the total dirt covered a mere 168 square yards. (**Tr. Ex. P 55**.) The total area of land touched by this dirt and stone covers less than .05% of the Residential Property's 3.15 acres. *Id.*

Brandt testified that in June of 2018, Neighbor David Mamo reported the dirt piles to Brandt and Green. Brandt then sent a cease and desist letter to EBI stopping completion of the driveway—without citation to any ordinance or authority—and directed the Hacks to complete and submit a fill and grading permit application "with engineered grading plans," "to be reviewed by the consulting engineers for the Township and approved by [Milford's] Board of Trustees." (**Tr. Ex. P 3**.) Brandt testified at trial that his letter was precipitated solely by dirt piles brought onto driveway area of the Hacks' property and that Milford Ordinance, Sec. 32-583. (**Tr. Ex. P 113**.)

To avoid further delay given their access issues, the Hacks retained the well-known engineering firm, Boss Engineering, to create engineered plan showing that any water displacement caused by the material brought in to build the driveway would be fully accommodated by a retention area built by the Hacks (the "Boss Plan"). (**Tr. Ex. P 4-2**.) In August of 2018, Boss duly completed its Plan. Boss Engineer LaVanway testified that the

Boss Plan fully accounted for the driveway's constructions and created an equilibrium between predevelopment and post-development so that whatever occurs in the future would not be any worse than what was prior to the house being constructed.

Milford directed its engineer, Michael Darga, to review the plan. Darga testified that he was aware of Mamo's complaints at the time of review. (**Tr. Ex. 7**.) Darga wrote Green as follows: "I don't have any objections to the proposed grading. It looks like they are providing more volume than what was there prior to construction of the house and driveway. . . ." (**Tr. Ex. P 6**.) Milford Engineer Darga likewise testified that Boss's Plan accounted for any displacement of water caused by the proposed driveway. Darga also reviewed an Oakland County "area map"—which contained contour lines, elevation levels, and the drainage pattern. (**Tr. Ex. P 127**.) Darga used this area map to determine the predevelopment contours for the area surrounding the Hacks' property and for the Hacks' property. Darga admitted that the Boss Plan elevation levels were consistent with the area map on which Darga relied to approve the Boss Plan. Indeed, Darga could identify no evidence at trial that the Home had actually been raised above the predevelopment elevation levels. *Id.* at p. 78:1-4.

On August 24, 2018, Darga issued a letter approving the Boss Plan without conditions. (**Tr. Ex. P 118**.)

Milford claimed its Board was authorized to review and approve Darga's August 24 approval pursuant to Milford Ordinance Sec. 32-583. (**Tr. Ex. P 113**.) Milford's Board

meeting took place on September 19, 2018. At the September 19 Milford Board meeting, Neighbor David Mamo testified that he showed the Board the same photographs that he had sent to Brandt, Green, and Bozynski eight months ago—and which had been investigated and dismissed. Mamo testified that his September 2018 presentation to the Board included no new documentation, measurements, calculations, etc.—just photographs from February of 2018. But evidence presented at trial, including the testimony of Brandt, Green, and Bozynski, demonstrated that these alleged concerns had already been investigated by Ordinance Officer Bozynski during *three separate* visits as non-issues and reported to Supervisor Green and Building Administrator Brandt. Further, Brandt testified that he had visited the Hacks' property over 20 times during construction and had never been able to corroborate Mamos' concerns. Green and Brandt never asked Ordinance Officer Bozynski to share his findings with the Milford Board and never reported the findings to Milford's Board or anyone else—before or after the September 2018 meeting.

At trial, engineers LaVanway and Darga testified that the *pre-development* drainage pattern of the drainage area surrounding the Hacks' property and the Mamos' property was such that water flowed easterly across the northern area of the Hacks' lot onto the Mamos' lot. Not coincidentally, David Mamo testified that the *only* location he ever saw water coming onto his property from the Hacks' property was in the area in which water flowed onto his property *pre-development*. Put differently, both of the parties' engineers agreed that any water flowing on David Mamo's property pre-existed the Hacks' ownership or

development of their lot. When David Mamo was confronted with the engineers' testimony on this point, David Mamo facilely testified he "disagreed" with the expert conclusions—and admitted he had no evidence, studies, surveys, or calculations supporting his disagreement.

Consistent with the testimony of the experts, Defendants Brandt and Green testified that they had investigated the two properties and never seen evidence corroborating Mamos' claim that the Hacks' construction was causing water to flood onto the Hacks' property. Defendant Brandt testified that in over twenty trips to the properties, he had never corroborated the Mamos' complaints. Defendant Green testified that he sent out Code Enforcement Bozynski *three* times to investigate the Mamos' complaint—all three times Officer Bozynski found no violations and closed the case. But this information was allegedly not shared with the Milford Board.

Milford refused to approve the Hacks fill and grade permit at the September 2018 meeting, despite Milford's own engineer writing that "any flooding that occurs post development should be similar to the flooding elevations predevelopment." (**Tr. Ex. P 118**.) The Milford Board instead demanded information "missing" from the Boss Plan, specifically the elevation levels behind the home. There is no requirement anywhere in the Ordinances to provide these elevation levels and such a requirement is irrelevant to the driveway, as testified to by Engineer LaVanway. Indeed, Darga approved the Boss Plan without this information because Darga did not need to know the elevation levels behind the house for construction of the driveway.

After the September 2018 Board meeting, Supervisor Green, Milford attorney Elowsky, and Board Member Mazzara met with Darga to reverse Darga's approval; Milford Engineer Darga candidly wrote that he "was directed by Milford Township to **re-review** the proposed fill and grading plans submitted" by Boss and the Hacks. (**Tr. Ex. P 122**) (emphasis added). At trial, Darga was confronted with his deposition testimony that he informed Milford that the ostensibly "missing information," e.g., the area north of the house, had no bearing on Boss's Plan as it related to construction of the driveway. Milford nonetheless secretly ghostwrote a letter under Darga's name, issued October 8, 2018.[1] (**Tr. Exs. P 119, 120**, and **122**.) Milford's October 8 letter provided that "it appears that certain pre-development conditions *may* have been different than originally presented by the applicant." (**Tr. Ex. P 122**.) But Darga testified that, contrary to his/Milford's October 8 letter, he did not review new materials, let alone anything that showed Boss's elevation levels to be inaccurate. Indeed, at the above-referenced meeting, they looked only at the Boss Plan and the "area map" Darga that had already reviewed. *Id.* at p. 165:8-20.

On this false pretext, Milford's October 8 letter added multiple conditions to construction of the driveway, including a "drainage area map showing the area's entire

[1] During discovery, Defendants vigorously opposed the Hacks receiving the ghostwritten letter, forcing the Hacks to compel the damaging information.

tributary system" and the ability for the Hacks' property to retain all rain caused by a "by a 10-year storm."[2] (**Tr. Ex. P 118**.)

On October 17, 2018, the Milford Board adopted the requirements allegedly required by Darga but ghostwritten by Milford. Again, neither Green nor Brandt informed the Milford Board that the sole basis for imposing the requirements—David Mamo's "concerns"—had been investigated and closed without corroborating Mamo's claims and without finding any ordinance violations.

PERTINENT PROCEDURAL HISTORY

On June 14, 2019, Defendants filed their Second Motion for Summary Judgment, which issues are again re-raised in the present Motion. (Dkt. No. 52.) The Hacks filed a detailed Response opposing Defendants' Second Motion for Summary Judgment. (Dkt. No. 63.)

On July 17, 2019, the Court heard oral arguments on Defendants' Second Motion for Summary Judgment; the Court rejected Defendants' argument that no reasonable Jury could find that Defendants violated the Hacks' substantive due process rights, rejected Defendants' argument that Defendants Green and Brandt were entitled to qualified immunity; the Court found that a fact issue exists as to whether Defendants had arbitrarily and capriciously and thereby deprived the Hacks of access to their Property. (Dkt. No. 71.)

[2] A 10-year storm, as testified by Darga, is the maximum amount of precipitation that would fall on the Hacks' home in a 10-year period. Darga testified he had no idea whether the Hacks property could hold this amount pre-construction and LaVanway testified *it could not* hold this amount *even with excavation*.

Trial began on July 17, 2019. On July 25, 2019, Defendants filed their Motion for Judgment as a Matter of Law, at the close of the Hacks' proofs. The Court took the matter under advisement and then allowed Defendants to present their Defense: Defendants introduced no new exhibits and called one witness, David Mamo. Defendants rested on July 29, 2019.

On July 31, the Jury—after two days of careful deliberation—entered a verdict against Defendants on all of Plaintiff's causes, finding that Defendants: 1) violated the Hacks' due process rights; 2) arbitrarily and capriciously applied Milford Ordinance, Sec. 32-583 to the Hacks' property; 3) arbitrarily and capriciously imposed inappropriate requirements for the Hacks' property; and 4) proximately caused the Hacks damages. (Dkt. No. 75.) For damages, the Jury: 1) awarded Joel Hack $119,000 in emotional distress damages and $10,000 in economic damages; 2) awarded Wren Hack $55,000 in emotional distress damages and $10,000 in economic damages; and 3) awarded $200,000 in punitive damages against the Milford Board, $5,000 in punitive damages against Green, and $1,000 in punitive damages against Brandt.

On August 5, 2019, the Court denied Defendants' Motion and entered Judgment in favor of the Hacks consistent with the Jury's above verdict. (Dkt. Nos. 77 and 78.)

STANDARD

A new trial pursuant to Fed. R. Civ. P. 59 is appropriate only if it "determines that the verdict is clearly against the weight of the evidence." *Denhof v. City of Grand Rapids,* 494

F.3d 534, 543 (6th Cir. 2007). "A trial court is within its discretion in remitting a verdict **only when**, after reviewing all evidence in the light most favorable to the awardee, it is convinced that the verdict is clearly excessive." *Fuhr v. Sch. Dist. of City of Hazel Park,* 364 F.3d 753, 761 (6th Cir. 2004). In order to grant a motion for remitter, a court must find that the jury's award "is: 1) beyond the range supported by proof; 2) so excessive as to shock the conscience; or 3) the result of mistake." *Szeinback v. Ohio State Univ.*, 820 F.3d 814, 820 (6th Cir. 2016).

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 *Bell v. Ohio State Univ.*, 351 F.3d 240, 249–50 (6th Cir. 2003), the Sixth Circuit identified the three circumstances giving rise to substantive due process violations:

1. Actions that deprive a particular constitutional guarantee;
2. Actions that deprive certain fundamental rights; and
3. Actions that shock the conscience.

"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.3d 564, 573 (6th Cir. 2008).

1. A reasonable jury could find that Defendants unlawfully deprived the Hacks of their particular Constitutional guarantee to access their property.

The Hacks have a specific Constitutional guarantee to effectively access their property, 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; 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."). "Property does not consist merely in the right to the soil, but in the right, as well, to its beneficial use and enjoyment." *Horton v. Williams,* 99 Mich. 423, 428 (1894). The Hacks' particular Constitutional property right includes access to their 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*, 99 Mich. at 428–29. "[W]hen a governmental unit injures that right of access, it injures a property interest." *Thom v. State (State Report Title: Thom*, 376 Mich. 608, 619, 138 N.W.2d 322, 326 (1965).

Michigan Courts have found property rights exist, and takings occur, "when the state has eliminated access to property"[3], or "made the usual access to plaintiffs' land very difficult." *Peterman v. State Dep't of Nat. Res.*, 446 Mich. 177, 189; 521 N.W.2d 499 (1994). The State cannot take a property right that does not exist.

In *Thom*, the State of Michigan had changed the grade of the public road (M-53) abutting the Thoms' farm and home such that access, while still possible, became impractical: "Because of the grade change, [Thom] has great difficulty in moving his farm machinery off the 80-acre site." *Thom*, 376 Mich. at 626. The Michigan Supreme Court noted that "in the facts of this case it is undisputed that the change in the highway grade made the usual access to plaintiffs' land **very difficult** . . . and we therefore hold that there was a partial taking of plaintiffs' property without due process of law." *Thom*, 376 Mich at 627. Michigan law, then, recognizes a property right not only in accessing property but being able to effectively access it.

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

[3] Citing *Ranson v. Sault Ste. Marie,* 143 Mich. 661, 670–671; 107 N.W. 439 (1906); *Big Rapids v. Big Rapids Furniture Mfg. Co.,* 210 Mich. 158, 175, 177 N.W. 284 (1920).

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).

Here, a reasonable jury could conclude that Defendants acted unreasonably, "in disregard of the facts," to deprive the Hacks of effective access to their property. The record is clear that the Hacks did not have effective access to their property and home for substantial periods of time. The Hacks testified that the lack of finished driveway prevented any vehicular access during a significant portion of the year. Green and Brandt also testified that they knew the water situation on the Hacks' front lawn, over their unfinished driveway, was severe and caused safety issues. The Hacks introduced multiple photos depicting the Hacks lack of access to their property. (**Tr. Exs. 44, 45, 107, 108, 109, 110**). The Hacks introduced a video depicting the severity of the lack of access caused by lack of a finished driveway. (**Tr. Ex. 46**). The Hacks introduced proof that not even USPS could access the property due to the incomplete driveway. (**Tr. Ex. 43**.)

This is in stark contrast to the situation in *Hussein v. City of Perrysburg*, 617 F.3d 828, 833 (6th Cir. 2010), mistakenly relied upon by Defendants. 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. 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*, 617 F.3d at 831.

The record is also clear that the loss of access was due to Defendants' conduct: the Hacks submitted a building plans, and later engineered plans, to complete their driveway, but Defendants halted construction with Brandt's cease and desist letter and then interfered with implementation of the engineered plans—without reason.

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." Brandt, Green, Darga, Rogers, and LaVanway all testified that they had never seen engineered plans required for a driveway and had never *any community*, including Milford, require stormwater calculations, a drainage area map, or tributary studies for a single-family detached residence. Their collective experience spans over a century and thousands of projects. Indeed, the Hacks presented evidence that Milford's own ordinances exempt single-family detached residences from providing stormwater calculations and drainage maps. (**Tr. Ex. P 114**.) 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.

Brandt also testified that building a driveway is part of the building permit process and that he does not apply Sec. 32-583 to other materials brought on site to implement the building permit plan, such as foundation sand and septic field sand.

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. The 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 when the Hacks tried to build their elevated 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, 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 above are highlights in a record that 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.

2. A reasonable jury could conclude that Defendants' conduct unreasonably deprived the Hacks of their fundamental right to access their property.

Even if the Court finds that there is no particularly Constitutional right to access one's property, the Jury nonetheless correctly concluded that Defendants deprived the Hacks' of their substantive due process rights. The Hacks have a fundamental right to effective access to their residential property. The Supreme Court has "regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 703, 117 S. Ct. 2258, 2260; 138 L. Ed. 2d 772 (1997). "The substantive component of the Due Process Clause protects 'fundamental rights' that are so 'implicit in the concept of ordered liberty' that 'neither liberty nor justice would exist if they were sacrificed.' *Doe v. Michigan Dep't of State Police*, 490 F.3d 491, 499 (6th Cir. 2007), *citing Palko v. Conn.,* 302 U.S. 319, 325; 82 L.Ed 288 (1937)

The right to access one's property (and home) is essential to its use and enjoyment.

The right to access and depart one's property also serves as a predicate to other fundamental rights that are inherently implicated by lack of access to one's 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). Freedom of movement is basic in our scheme of values." *Beydoun v. Sessions*, 871 F.3d 459, 467 (6th Cir. 2017). 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.

Query this: what would occur in this society if municipalities could *force* citizens to choose between being stranded on their property or abandoning their property altogether due to lack of effective access to and from their property? The idea is antithetical to deeply-rooted American values championing freedom of movement and the right to reasonably enjoy one's property in peace and security. A reasonable jury could conclude that Defendants acted arbitrarily and capriciously to deprive the Hacks of their fundamental right to effectively access their property.

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

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. Well before trial, the Hacks had clearly identified their Constitutional right to effectively access to their property. Indeed, Michigan citizens' right to access their property has been established for over a century. Section 1983 rights, too, have been long-established. "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. "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).

Defendants incorrectly assert that it was "clearly established in 2017 and 2018 that Plaintiffs had to apply for and receive Board approval to dump over 900 yards of fill material on their property," and therefore Defendants had no inkling their conduct ran afoul of the Hacks' rights. Dkt. No. 91 at PageID 3026.[4] To the contrary, it was *not* clearly established

[4] Defendants implicitly refer to Milford Ordinance, Section 32-583.

that residents had to apply for and receive Milford Board approval to complete a driveway. Milford's Ordinances contain no permitting process for installation of a driveway for a single-family detached residence. And this process has never been applied by anyone in Milford's history. Further, the Hacks submitted a plot plan that included a driveway and were directed, via Brandt's Plan Review, to "install[] and maintain" a driveway "at all times" on the property. Thus, the Hacks argued at trial that the Defendants had selectively applied Milford Ordinance, Section 32-583 by requiring the Hacks—the first citizens ever—to obtain a permit in order to complete a residential driveway. At trial, the Hacks presented substantial evidence that Defendants have never required any other resident to undergo this process to build a residential driveway. The Jury Verdict Form directly asked the Jury to answer whether "Defendants arbitrarily and capriciously applied Milford Ordinance, Sec. 32-583 to the Hacks' property." Dkt. No. 75 at PageID 2571. Answer: YES. *Id.*[5]

Even if Sec. 32-583 applied, the Jury found that Defendants "arbitrarily and capriciously imposed inappropriate requirements for the Hacks' property." *Id.* Indeed, at trial, the Hacks presented evidence that Defendants required the Hacks to satisfy requirements that had never been imposed on another applicant seeking to construct a single-family detached residence, including a) stormwater calculations; b) the ability to

[5] Sec. 32-583 prohibits "any person to *use land for filling with materials*". Defendants cite to the definition of "filling" but ignore that there is no evidence in the record that the Hacks were *using land for filling with materials*. The Hacks were building a driveway which included foreign material—as all driveways do. Defendants also ignore two critical facts: 1) the Jury was entitled to conclude, based on the totality of the evidence presented and Milford's past treatment of Milford residents, that the Hacks were not in fact "filling" the land by constructing their driveway; and 2) that Milford applied Sec. 32-583 pretextually, knowing it did not apply. Either decision would be arbitrary and capricious.

retain a 10-year storm; and c) a drainage area map for the 13 acres surrounding the Hacks' property. Defendants argued that these requirements were imposed ostensibly due to the Mamos' concerns that the Hacks' project was causing flooding on the Mamos' property, and that such requirements were appropriate in light of the Mamos' concerns. However, the Hacks presented significant evidence showing that 1) the Mamos had voiced these concerns many months prior to Defendants imposing the above requirements on the Hacks; 2) that Defendants Green and Brandt had investigated the Mamos' concerns many months prior to Defendants imposing the above requirements on the Hacks; and 3) that Defendants Green and Brandt had found no evidence to corroborate the Mamos' concerns. There is sufficient evidence for a jury to conclude that Brandt's and Green's conduct was objectively unreasonable, arbitrary, and capricious. *Cf. Zumbroegel v. City of Dearborn Heights*, 705 F. Supp. 358, 363 (E.D. Mich. 1989).

C. Milford is directly liable for the wrongdoing of Defendants Green, Brandt, and the Milford Board.

Defendants concede that a municipality may be liable under § 1983 based on "(1) the [entity's] . . . official policies; (2) actions taken by officials with final decision-making authority." Dkt. No. 91 at PageID 3028. Milford is liable under both theories.

Milford is directly liable through its officials, Supervisor Green and Building and Zoning Administrator Brandt.[6] Milford is also directly liable through the Milford Board—the

[6] "[D]ecisions made by officials with 'final policymaking authority' are attributable to a governmental entity." *City of St. Louis v. Praprotnik,* 485 U.S. 112; 108 S.Ct. 915, 924 (1988).

governing body through which Milford makes official decisions. and through official Board decision-making—is **directly** liable for requiring a fill and grade permit and for the requirements, set forth and adopted, in the October 8 letter.[7] Milford has no immunity in this case, qualified or otherwise.

The Milford Board enacted Ordinance Sec. 32-583. Later, the Milford Board arbitrarily and capriciously applied Sec. 32-583, and imposed requirements, to deprive the Hacks of their right to access their property. A municipality's legislative action constitutes official policy: "No one has ever doubted . . . that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body . . . even a single decision by such a body constitutes an act of official government policy." *Pembaur*, 475 U.S. at 480.

Pursuant to Milford Ordinance, Sec. 32-583, the Milford Board reserved for itself the final decision to impose "appropriate" requirements. Pursuant to Sec. 32-583, Milford's Board directly imposed no fewer than three requirements on the Hacks before they could build their driveway. Those Jury reasonably found those requirements arbitrary and capricious. Milford is also directly liable for Defendant Brandt's decision to require the Hacks to obtain a fill and grade permit, ostensibly pursuant to Sec. 32-583. At trial, the Hacks established that Defendant Brandt had the final decision-making authority to require the Hacks to obtain a fill and grade permit. The Hacks submitted sufficient evidence from

[7] Regardless, Milford itself enacted Ordinance Sec. 32-583 and is itself the "moving force" behind the constitutional violations under even a *respondeat superior* "moving force". *See Pembaur v. City of Cincinnati,* 475 U.S. 469, 483, 106 S.Ct. 1292 (1986).

which the Jury could reasonably conclude that this permitting requirement was imposed on the Hacks arbitrarily and capriciously, including the fact that Defendant Brandt arbitrarily classified driveway material as "fill material" for the first time in his career and despite previously authorizing the Hacks to build the driveway pursuant to the building permit previously issued to the Hacks.

D. Defendants misapply the "rationally related to a legitimate state interest" analysis.

Defendants argue that Defendants were allowed to deprive the Hacks of their Constitutional rights so long as Defendants claim their actions were "rationally related to a legitimate state interest." Defendants distort the proper substantive due process analysis: "Where government action does not deprive a plaintiff of a particular constitutional guarantee or shock the conscience, that action survives the scythe of substantive due process so long as it is rationally related to a legitimate state interest." *Valot v. Se. Local Sch. Dist. Bd. Of Educ.*, 107 F.3d 1220, 1228 (6th Cir. 1997). Put differently, government action that is rationally related to a legitimate state interest does not violate substantive due process rights **unless** the government's action deprives a particular constitutional guarantee or shocks the conscience.[8] In this case, the Jury found that Defendants arbitrarily and capriciously applied requirements to the Hacks' property and deprived the Hacks' of their substantive due process rights by interfering with the Hacks' access to their property. At

[8] As stated above, government action that deprives a fundamental right would likewise obviate a "legitimate state interest" analysis.

trial, the Hacks did not challenge Milford's Ordinances, including Sec. 32-583, but rather challenged Defendants' decision to apply its ordinances arbitrarily and capriciously to the Hacks. The Jury concluded that occurred. Regardless, the evidence introduced at trial, and the Jury's verdict, confirm that that Defendants could not establish a rational relationship between the terms of Sec. 32-583 and a legitimate governmental purpose, as applied to the Hacks.

E. The Jury awarded appropriate compensatory and punitive damages.

Without explanation, Defendants assert that "the jury's award of emotional distress damages ($119,000 for Joel and $55,000 [sic] for Wren) have no basis in fact and are therefore excessive." Joel Hack testified about his new diagnosis of post-traumatic stress disorder, and how life has emotionally changed for him and for the relationship between him and his wife, based on Defendants' misconduct. Joel Hack's emotional suffering and treatment was testified to by Dr. Les, his treating provider. Further, the Hacks presented medical letters from Joel Hack's treating providers, Dr. Kumar and Dr. Tisdale, who described how Milford's and Milford's actions had caused Joel emotional suffering with associated symptomology and increased need for therapy visits and medications.

Wren Hack personally testified about how Defendants caused her emotional suffering, feelings of alienation, and feelings of fear caused by Defendants cutting them off from their home, the roads, friends, family, and safety and emergency vehicles. "A plaintiff may testify regarding his or her own subjective feelings to place emotional damages at

issue." *Wilson v. Gen. Motors Corp.,* 183 Mich. App. 21, 40; 454 N.W.2d 405 (1990). In Wilson, the Michigan Court of Appeals upheld an award of $375,000 in emotional damages where the plaintiff submitted "only testimony as to her own subjective feelings". *Id. See also Silberstein v. Pro-Golf of Am., Inc.*, 278 Mich. App. 446, 464–65; 750 N.W.2d 615, 628 (2008) (upholding $150,000 in emotional damages "even considering the purely subjective nature of plaintiff's damages).

Defendants incorrectly claim that the Jury improperly awarded $20,000 in compensatory [sic] damages because the Hacks "only economic damage was $720." Dkt. No. 91 at PageID 3030. The Jury Instructions specified that the Hacks were entitled to "the medical care that Joel Hack reasonably needed and actually obtained, and the present value of such care and supplies that Joel Hack is reasonably certain to need in the future." At trial, the Hacks introduced evidence, through the testimony of both Joel Hack, Wren Hack, and Dr. Bernie Les, that Joel Hack had been required to increase his medical treatment by multiple visits and new prescriptions. The Hacks also introduced the medical letters of Dr. Tisdale and Dr. Kumar documenting Joel Hack's increased need for care, including a new diagnosis for post-traumatic stress disorder. The Hacks jointly pay for this increased cost of care, and the Jury had sufficient evidence from which to award $20,000 in economic damages. Finally, Engineer LaVanway testified about the significant cost of complying with Milford's arbitrary and capricious demands; the cost of the Boss Plan alone cost more than $2,000.

The Jury's $194,000 verdict on punitive damages is proportional to the Jury's $206,000 verdict for punitive damages and proportional to the reprehensibility of Defendants' misconduct. *Romanski*, 428 F.3d at 643.

Defendants assert that the Milford Board may not liable for punitive damages because *municipalities* may not be liable for punitive damages. Municipalities may not be liable for punitive damages because "neither the retributive nor the deterrence objectives of punitive damages and of § 1983 would be significantly advanced by holding municipalities liable for such damages." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 248, 101 S. Ct. 2748, 2750, 69 L. Ed. 2d 616 (1981). First, Milford's Board is not a municipality. Second, the deterrence and retribute objects are advanced here: Milford's Board *directly* authorized, and voted for, the requirements deemed arbitrary and capricious by the Jury. Holding it liable for punitive damages send a deterrent and retributive message to the Board, including financial and political ramifications.

Even if the Milford Board cannot be held liable for punitive damages, it may reasonably be held liable for exemplary damages in the amount of $200,000. In Michigan, the terms "exemplary damages" and "punitive" damages are frequently "used interchangeably." *Ray v. City of Detroit, Dep't of St. Railways*, 67 Mich. App. 702, 704, 242 N.W.2d 494, 495 (1976). Thus, exemplary damages "may be called punitive." *Ray*, 67 Mich. App. at 705. An award of exemplary damages is proper if it compensates a plaintiff for the humiliation, sense of outrage, and indignity resulting from injustices maliciously,

wilfully, and wantonly inflicted by the defendant. *Kewin v. Massachusetts Mut. Life Ins. Co.,* 409 Mich. 401, 419; 295 N.W.2d 50 (1980). The theory is that the reprehensibility of the defendant's conduct both intensifies the injury and justifies the award of exemplary damages as compensation for the harm done the plaintiff's feelings. *Kewin,* 409 Mich. at 419. Michigan courts routinely uphold exemplary damage awards against municipalities**.** *Janda v. City of Detroit*, 175 Mich. App. 120, 126, 437 N.W.2d 326, 329 (1989) (upholding exemplary damage award against City of Detroit for deprivation of plaintiff's constitutional due process rights and violation of 42 U.S.C. § 1983); *Ray*, 67 Mich. App. at 708; 242 N.W.2d 494, 495 (1976). Here, the jury was instructed to consider whether to award punitive damages only if a defendant acted "maliciously, wantonly, or oppressively." The Jury did so, and also found that Defendants proximately caused the Hacks *actual* damages. An award of $200,000 in exemplary damages is reasonable even if labelled as punitive damages based on harm maliciously, wantonly, or oppressively caused by the Milford Board.

CONCLUSION

ACCORDINGLY, the Court should deny Defendants' Motion.

Respectfully submitted,

/s/ R.J. Cronkhite
R.J. Cronkhite (P78374)

Dated: September 24, 2019

CERTIFICATE OF SERVICE

I hereby certify that on September 24, 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: September 24, 2019 /s/ R.J. Cronkhite