UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

HACK, et al.,

Plaintiffs,

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

v.

CHARTER TOWNSHIP OF MILFORD, et al.,

Defendants.

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DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION [ECF #95] TO DEFENDANTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, MOTION FOR NEW TRIAL, AND MOTION FOR REMITTITUR [ECF #91]

PROOF OF SERVICE

I. NO SUBSTANTIVE DUE PROCESS VIOLATION OCCURRED

Michigan law allowed the Township to regulate "earth changes" on private property. Mich. Comp. Laws § 324.9106(1). "[F]ill activities" are a form of earth change, Mich. Comp. Laws § 324.9101(9), and "filling means the depositing or dumping of any matter onto or into the ground, except common household gardening." Ord. § 32-2 (ECF #91-4, PageID.3134). Dumping fill material required Board preapproval. Ord. § 32-583 (ECF #16-4, PageID.513) (referencing Mich. Comp. Laws § 324.9101, *et seq*.). However, Plaintiffs failed to obtain Board approval before dumping fill material from a construction site in Novi, Michigan onto their property. *See* (ECF #52-5, PageID.1586, pp. 67-68).

A. Plaintiffs had No Legitimate Claim of Entitlement to Deposit Fill Material Without Board Preapproval

"[A] party cannot possess a property interest in the receipt of a benefit when the state's decision to award or withhold the benefit is wholly discretionary." *Med. Corp., Inc. v. City of Lima*, 296 F.3d 404, 409 (6th Cir. 2002). Since Ord. § 32-583 gave the Board discretion to approve or deny fill activities, Plaintiffs were not entitled to dump fill material on their property without applying for and receiving a permit to do so. Plaintiffs respond by contending they had a right to build a driveway, but "no driveway . . . is lawful except pursuant to a permit[.]" Mich. Comp. Laws § 247.322. Even if the Hacks obtained driveway and building permits before dumping fill material, those permits required them to "obtain, all required . . . local permits,"

O.C.R.C. Rule 2.5.16 (ECF #91-1, PageID.3056), and "d[id] not grant permission for additional or *related* work which *requires separate permits*." (ECF #16-2, PageID.509) (emphasis added).

B. Plaintiffs had No Constitutional or Fundamental Right To "Effective" Access to the Highway

Plaintiffs do not dispute that property interests are born out of state law, not the Constitution. *See* (ECF #95, PageID.3173) (citing and quoting *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). Instead, Plaintiffs claim "a fundamental right to effective access" and rely on *Johnson v. City of Cincinnati*, 310 F.3d 484 (6th Cir. 2002), a case involving the right to intrastate travel. However, "it would distort the right to free travel beyond recognition to construe [the right] 'as providing a substantive right to cross a *particular* parcel of land[.]" *Williams v. Town of Greenburgh*, 535 F.3d 71, 75-76 (2d Cir. 2008) (emphasis in original). Moreover, the list of fundamental rights "is short, and the Supreme Court has expressed very little interest in expanding it." *Seal v. Morgan*, 229 F.3d 567, 574-75 (6th Cir. 2000).

Plaintiffs' reliance on *Mich. State Highway Comm'n v. Sandberg*, 383 Mich. 144, 174 N.W.2d 761 (Mich. 1970) is overstated. *Sandberg* found that property previously conveyed to the State of Michigan "did include the access rights here involved." *Id*. at 150. Because of that conveyance, the Highway Commission was permitted to "erect[ ] a fence separating the conveyed strip from the remaining Franklin farm[.]" *Id*. at 147. Subsequent purchasers of the remainder of Franklin

farm *did not retain a right of access* to Highway 127. *Id*. at 150. This case demonstrates only that access to a highway is a state-created property interest subject to government regulation. Here, Plaintiffs had no property interest in dumping fill material until they obtained a Board approved fill and grade permit.

Plaintiffs' reliance on *Thom v. State*, 376 Mich. 608, 138 N.W.2d 322 (Mich. 1965) and *Peterman v. State Dep't of Nat. Res.*, 446 Mich. 177, 521 N.W.2d 499 (Mich. 1994) is misplaced. In *Thom*, the government raised the grade of a highway ten feet higher than the neighboring plaintiff's access drive, causing a partial taking of land without compensation. *Thom*, 376 Mich. at 625-26. In *Peterman*, an inverse condemnation case, the government's construction of a boat launch caused the plaintiff's nearby beach to eventually disappear. *Peterman*, 446 Mich. at 191. But here, Plaintiffs' limited access was not the result of any government alteration of the land. Instead, it was the result of the Hacks' decision to place their driveway in the lowest (and most flood prone) portion of their land.

C. Defendants' Actions Were Neither Arbitrary, Nor Capricious, And Did Not Shock the Conscience

Since there is no enumerated constitutional or fundamental right to "effective" access, Defendants' "actions. . . will be upheld if . . . they are rationally related to a legitimate state interest." *Seal*, 229 F.3d at 575. The government "need not select the best or the least restrictive method of obtaining its goals so long as the means selected are rationally related to those goals." *Schenck v. City of Hudson*, 114 F.3d

590, 594 (6th Cir. 1997). The facts show that Defendants' actions were rationally related to protecting the public's health, safety, and welfare in an area prone to flooding. *See* (ECF #16-7, PageID.524); *see also Cummins v. Robinson*, 283 Mich. App. 677, 770 N.W.2d 421 (Mich. Ct. App. 2009). The letter signed by Darga notes the rationale for each condition imposed. (ECF #16-7, PageID.524).

Plaintiffs repeatedly assert that Defendants "never . . . corroborate[d]" David Mamo's complaints about flooding. *See, e.g.*, (ECF #96, PageID.3167-68, 3170, 3177-78, 3183). But Mamo's complaints about fill being dumped on Plaintiffs' property remain unrebutted. (ECF #52-9, PageID.1668-69). Plaintiffs also challenge the relevance of requiring "stormwater calculations" related to "accommodation of a 10-year storm" (ECF #95, PageID.3176), but ignore the Road Commission's nearly identical requirements. *See* O.C.R.C. Rule 6.9.3, 4(C) (ECF #91-1, PageID.3116). Plaintiffs then assert in a footnote that "there is no evidence in the record that the Hacks were using land for filling with materials[,]" and "that the Hacks were not in fact 'filling' the land[.]" (ECF #95, PageID.3182 n.5) (emphasis removed). But Plaintiffs were not engaging in common household gardening, therefore they needed Board approval. Ord. § 32-583 (ECF #16-4, PageID.513).

Plaintiffs failed to "negative every conceivable basis which might support" the conditions imposed. *Am. Express Travel Related Servs. Co., Inc. v. Kentucky*, 641 F.3d 685, 690 (6th Cir. 2011). Nor did Plaintiffs show that Defendants' behavior

was "so shocking as to shake the foundations of this country." *See EJS Props. LLC v. City of Toledo*, 698 F.3d 845, 862 (6th Cir. 2012) (zoning board soliciting $100,000 bribe for favorable ruling did not shock the conscience). Plaintiffs argue these three conditions were never imposed before, but Plaintiffs fail to suggest (or prove) that any other property owner in Milford engaged in similar filling activity in an area known to flood.

D. Qualified Immunity and *Monell*

"[T]he 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). Clearly established law required Plaintiffs to obtain Board approval before dumping fill. Ord. § 32-583 (ECF #16-4, PageID.513). For this reason, qualified immunity bars Plaintiffs' individual capacity § 1983 claims. Preventing Plaintiffs continued construction (*i.e.*, depositing more fill material) prior to obtaining a permit was not a clearly established due process violation. Furthermore, Plaintiffs' *Monell* policymaker indifference claim fails because a policymaker cannot be deliberately indifferent to a right that is not clearly established. *See Arrington-Bey v. City of Bedford Heights*, 858 F.3d 988, 994 (6th Cir. 2017). Moreover, the government was not the moving force behind the alleged deprivation. *See Bd. Of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 404 (1997). Instead, Plaintiffs' decision-making, bad weather, and flooding caused their alleged injuries.

II. THE DAMAGE AWARD REQUIRES REMITTITUR OR A NEW TRIAL

The jury's damage award was erroneous and excessive because "the injury caused by a justified deprivation, including distress, is not properly compensable under § 1983." *Carey v. Piphus*, 435 U.S. 247, 263-64 (1978). Even if a deprivation occurred, the Hacks' testimony regarding medical expenses for alleged emotional distress does not permit a double recovery for "Economic, Out-of-Pocket Damages" and "Emotional Distress Damages[.]" (ECF #75, PageID.2571-72). Moreover, Plaintiffs do not dispute that their out-of-pocket expenses did not amount to $20,000.

Regarding punitive damages, Plaintiffs assert that "Milford's Board is not a municipality." (ECF #95, PageID.3188). But their claim against the Board "is, in all respects other than name, to be treated as a suit against" the Township itself. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Importantly, Plaintiffs do not dispute the fact that their claims against the Board are not individual capacity § 1983 claims. Plaintiffs cannot recharacterize punitive damages as exemplary damages since punitive damages are not permitted against municipal entities in § 1983 lawsuits. *See, e.g., Ritchie v. Coldwater Cmty. Schs.*, 947 F.Supp.2d 791, 817-18 (W.D. Mich. 2013) (punitive damage claim against school board failed as a matter of law because that category of damages is not available against a municipality) (citing *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981)).

Plaintiffs' reliance on *Ray v. City of Detroit Dep't of St. Rys.*, 67 Mich. App. 702 (Mich. Ct. App. 1976) and *Janda v. City of Detroit*, 175 Mich. App. 120 (Mich. Ct. App. 1989) is misplaced. Neither case has precedential value, *see* Mich. Ct. R. 7.215(J)(1), neither case references nor analyzes *City of Newport*, and the defendants in *Janda* failed to object to punitive damages. *Janda*, 175 Mich. App. at 130. Moreover, *Ray* acknowledged that "only exemplary damages which are *compensatory* in nature are allowable. . . . They are *never* allowed, however, for the purpose of punishing or making an example of a defendant." *Ray*, 67 Mich. App. at 704 (emphasis added, citations omitted). *Ray* reasoned that "[s]ince exemplary damages must be compensatory in nature, and not punitive, they are in effect but another item of 'actual' damage." *Id*. Since the jury already awarded compensatory damages, Plaintiffs cannot recharacterize punitive damages as exemplary damages because that would result in an impermissible double recovery. *See Gen. Tel. Co. of the Nw. v. EEOC*, 446 U.S. 318, 333 (1980).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2019, I electronically filed the foregoing paper(s) with the Clerk of the Court using the ECF system and that I have mailed by United States Postal Service the Paper(s) to the following non-ECF participants: None.

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