**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' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, MOTION FOR NEW TRIAL, AND MOTION FOR REMITTITUR**

NOW COME Defendants CHARTER TOWNSHIP OF MILFORD; TOWNSHIP OF MILFORD BOARD; DONALD D. GREEN; and TIMOTHY C.

BRANDT, by and through their attorneys, O'CONNOR DeGRAZIA TAMM & O'CONNOR, and for their Renewed Motion for Judgment as a Matter of Law pursuant to Fed. R. Civ. P. 50(b), for a New Trial pursuant to Fed. R. Civ. P. 59, and for Remittitur state as follows:

1. Plaintiffs allege that Defendants violated their substantive due process rights when they sought to construct a driveway on their land. *See* (ECF #1).

2. Defendants moved twice for summary judgment and moved for directed verdict. (ECF ##16, 52, 72). This Court granted part of Defendants' original motion for summary judgment but denied Defendants' second summary judgment motion and motion for directed verdict. (ECF ##43, 71, 77).

3. The jury found in favor of Plaintiffs, and this Court entered a Judgment on August 5, 2019. (ECF #78).

4. For the reasons stated in the attached Brief in Support, Defendants now renew their Motion for Judgment as a Matter of Law pursuant to Fed. R. Civ. P. 50(b), alternatively move for a new trial pursuant to Fed. R. Civ. P. 59, and also seek remittitur.

5. Prior to filing this Motion, on September 2, 2019, counsel for Defendants attempted to discuss these issues, the nature of this Motion, its legal basis, and the relief sought with opposing counsel via telephone. E.D. Mich. L.R.

7.1(a). Plaintiffs' counsel denied concurrence and expressed her intention to oppose this Motion. E.D. Mich. L.R. 7.1(a)(2)(A).

WHEREFORE Defendants CHARTER TOWNSHIP OF MILFORD; TOWNSHIP OF MILFORD BOARD; DONALD D. GREEN; and TIMOTHY C. BRANDT respectfully ask that this Honorable Court grant this Motion, set aside the jury's verdict, rescind any injunctive or declaratory relief in Plaintiffs' favor, enter judgment in favor of Defendants, and dismiss Plaintiffs' claims with prejudice.

Respectfully submitted,

O'CONNOR, DEGRAZIA, TAMM & O'CONNOR

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

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**BRIEF IN SUPPORT OF DEFENDANTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW, MOTION FOR NEW TRIAL, AND MOTION FOR REMITTITUR**

**CERTIFICATE OF SERVICE**

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## STATEMENT OF ISSUES PRESENTED

1. Does the evidence show that Defendants are entitled to judgment as a matter of law?

   Defendants answer: Yes.
   Plaintiffs answer: No.

2. Are Defendants entitled to a new trial?

   Defendants answer: Yes.
   Plaintiffs answer: No.

3. Is remittitur necessary?

   Defendants answer: Yes.
   Plaintiffs answer: No.

## CONTROLLING/APPROPRIATE AUTHORITY FOR RELIEF SOUGHT

Judgment as a matter of law: Fed. R. Civ. P. 50(b)

New trial: Fed. R. Civ. P. 59

Remittitur: *Denhof v. City of Grand Rapids*, 494 F.3d 534, 547 (6th Cir. 2007).

## STATEMENT OF FACTS

Plaintiffs Joel Hack and Wren Beaulieu-Hack (collectively, "Plaintiffs" or the "Hacks") purchased 2610 Pearson Road, a vacant 3.15-acre parcel of land in Milford Township, on June 13, 2016. (Complaint, ECF #1, PageID.20, ¶¶ 11-13). The Hacks hired EBI, Inc. to build a home on the property. (*Id.* at ¶ 14). EBI submitted an application and site plan to the Township in November 2017 to obtain a building permit. (*Id.* at ¶ 17). The Township's Zoning Administrator, Defendant Timothy Brandt, reviewed the application and issued a "Building permit to install 2016 sq ft premanufactured *home* on a new *basement* with new *garage* per App, 2015 MRC and Twp codes" on November 13, 2017. (Permit, ECF #16-2, PageID.509) (emphasis added). The Permit was "*only* for the work described, and d[id] not grant permission for additional or *related* work which *requires separate permits*." (Permit, ECF #16-2, PageID.509) (emphasis added).[1]

[1] Brandt advised the Hacks that "[a] driveway shall be installed and maintained at all times for safe ingress and egress of emergency vehicles." (Plan Review Record, ECF #41-4, PageID.1076). This instruction was not a substitute for Township fill and grade permits nor Road Commission permits necessary for lawfully conducting earth changing activities to construct the Hacks' desired driveway, because only the Township Board could approve a fill and grade permit. *See* Mich. Comp. Laws § 247.321, *et seq.*; Oakland County Road Commission Rule 2.5.16 (Exhibit A) (also available at: https://www.rcocweb.org/DocumentCenter/View/230/Permit-Specifications-and-Guidelines-PDF?bidId=); Mich. Comp. Laws § 324.9101, *et seq.*; Township Ordinance § 32-583 (Ord. § 32-583, ECF #16-4, PageID.513).

Before any permit issued, the Hacks began building a driveway. Hartland Septic Service dumped 311 yards of crushed concrete between November 7 and 8, 2017. (Invoice, ECF #52-4, PageID.1557). Hartland noted the "driveway was *built up higher than normal due to potential flooding* in the springtime." (*Id*.) (emphasis added). Then, in December 2017, EBI sought and obtained a Residential Driveway Permit from the Oakland County Road Commission. (Complaint, ECF #1, PageID.21, ¶ 24); (Rogers Aff., ECF #22-9, PageID.670, ¶ 12). However, the Hacks did not obtain a fill and grade permit. Nonetheless, EBI dumped at least "168 square yards [of dirt], mixed with 112 square yards of stone." (Rogers Aff., ECF #22-9, PageID.669, ¶ 10).

Jeff Boutell, the owner of Hartland, testified that his company (1) stripped off the top soil from the area that would become the driveway on November 7 and 8, 2017; (2) dug out the basement on November 30, 2017; and then disturbed the excavated dirt over the Hacks' land – further changing the property's elevation. (Boutell Dep. Tr., ECF #52-5, PageID.1574-75, 1579, pp. 20-24, 38-39). Boutell's company also installed a septic field at a higher grade than the pre-construction level and raised the side, rear, and front of the property. (*Id*. at PageID.1577, 1592, pp. 32, 89).

Not long after work began on the Hacks' property, a neighboring property owner, David Mamo, expressed "concern[] about the potential" of his property

flooding because of the Hacks' construction project. (Joel Hack Dep. Tr., ECF #52-2, PageID.1526, p. 79). Mamo lived next to the Hacks' land for 30 years and routinely observed standing water on the Hack property. (Mamo Dep. Tr., ECF #52-3, PageID.1539-40, pp. 24-25). Then in February 2018, Mamo advised the Hacks of flooding on his property which he attributed to the construction activity. (*Id*. at PageID.1546, p. 51). The Hacks investigated, observed standing water, and contacted EBI to address the issue. (Joel Hack Dep. Tr., ECF #52-2, PageID.1527-28, pp. 84, 86-88).

Mamo also contacted the Township regarding the flooding on his property. (Mamo Emails, ECF #52-6, PageID.1599-1602). In response, the Township Supervisor, Defendant Donald Green, asked Township Ordinance Officer William Bozynski to investigate. (Bozynski Dep. Tr., ECF #52-7, PageID.1608, pp. 6-8). The standing water was gone by the time Bozynski visited the area, but he nonetheless observed "erosion" indicative of "water . . . flowing from [the Hacks'] property onto Mamos' property." (*Id*. at PageID.1620 pp. 57-58). "[I]t was clear to even a layperson that water had traversed from [the Hacks'] property onto Mamos' property." (*Id*. at PageID.1611, p. 20). However, because the water was gone, Bozynski advised Brandt and Green that he "felt the issue was resolved and that no further action was necessary." (*Id*. at PageID.1614, p. 35); (Bozynski Notes, ECF #41-14, PageID.1106).

Boutell testified that "[t]he driveway [was] complete" on April 26, 2018. (Boutell Dep. Tr., ECF #52-5, PageID.1583, p. 54). However, "the driveway is in that lower area of the property and it holds some water, so [in June 2018] we wanted to build that driveway up[.]" (*Id*. at PageID.1584, p. 60). Around the same time, Mamo made more complaints to the Township. *See* (Mamo Emails, ECF #52-6, PageID.1603-05). On June 4, 2018, Mamo informed Brandt and Green that "some nasty fill dirt with block and brick in it" was now on the Hack property. (June Emails, ECF #52-9, PageID.1668-69). Boutell confirmed Mamo's allegation when he later testified that fill material from a construction site in Novi, Michigan was dumped on the Hacks' property. (Boutell Dep. Tr., ECF #52-5, PageID.1586, pp. 67-68). But Brandt had already told the Hacks "don't bring anymore dirt on." (Brandt Dep. Tr., ECF #52-8, PageID.1644, p. 88).

Based on Mamo's June 4 complaint, Brandt sent a letter to EBI on June 13, 2018 advising them that "[t]he filling and grading activity . . . requires review, approval and permitting from this office." (Brandt Letter, ECF #41-5, PageID.1079). Brandt gave the Hacks and EBI "ten (10) days to begin the process of securing the necessary approvals for this work and [advised them to] cease the further placement of fill material on the property until an approval is granted." (*Id*.). Brandt provided a fill and grade permit application with the letter and noted the Board would need to approve the application. (*Id*.); *see also* (Ord. § 32-583, ECF #16-4, PageID.513).

In July 2018, the Hacks requested and received a temporary occupancy permit allowing them to live in their new home while the fill and grade permit application was processed. (Wren Beaulieu-Hack Dep. Tr., ECF #50-4, PageID.1417, pp. 18-19). Around the same time, the Hacks retained Boss Engineering to prepare the plans and other information needed to complete the fill and grade permit application. Boss engineer Brent Lavanway testified that he did not know whether the driveway, as it existed when the Boss surveyors took measurements, "was raised or not from preconstruction conditions," and did not know how much material was dumped on the Hacks' property before the survey. (Lavanway Dep. Tr., ECF #63-21, PageID.2397, p. 136). On August 14, 2018, Boss submitted a proposed engineering plan to the Township's engineer consultant, Michael Darga, P.E. of Hubbell, Roth & Clark ("HRC"). *See* (Boss Plan, ECF #41-6, PageID.1081).

Darga reviewed the proposed Boss plan. On August 24, 2018, Darga sent a letter to Brandt stating that his "office does not object to the proposed grading plan." *See* (8/24/18 Letter, ECF #16-5, PageID.515). Darga noted "we are assuming that the existing contours on the plan are from the pre-development of the property and accurately reflected the pre-development conditions." (*Id.*). However, neither Boss nor HRC/Darga knew of the fill that had been dumped on the Hack property from the Novi construction site. Nonetheless, consideration of the Boss plan was placed on the Township Board's September 19, 2018 meeting agenda.

On September 19, 2018, the Board held a public meeting. *See* (9/19/18 Minutes, ECF #16-6, PageID.517). Mamo was in attendance and "gave a presentation on how the addition of the driveway and filling of dirt has affected his property." (9/19/18 Minutes, ECF #16-6, PageID.520). EBI's owner, William Rogers, was in attendance as well. (*Id*.); *see also* (Rodgers Aff., ECF #22-9, PageID.668, ¶ 3). However, Rogers was unprepared to refute or rebut Mamo's assertions. (Rogers Dep. Tr., ECF #52-11, PageID.1715, p. 72). The Township's attorney, Jennifer Elowsky, was also in attendance and felt "uncomfortable having the board make a decision on this [plan] without having more documentation and having the Township engineer look further into this issue." (9/19/18 Minutes, ECF #16-6, PageID. 520). The Board then postponed the matter "until the board [received] more information from the Township engineer regarding the property." (*Id.* at PageID.521).

Thereafter, Darga re-reviewed the Boss plan. In an October 8, 2018 letter, Darga requested additional information because "it appears that certain pre-development conditions may have been different than originally presented by the applicant." (10/8/18 Letter, ECF #16-7, PageID.524); (Darga Dep. Tr. Vol. II, ECF #52-13, PageID.1768, 1776, pp. 222-23, 253). Darga/HRC recommended the Township approve the fill and grade permit application subject to the following conditions:

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

2. The applicant must improve the proposed swales, according to Township standards, to divert water from behind the home to the low area. It appears that the current site grading may be impeding the flow of water from the east and not allowing it to make it to the low area.

3. The plans should include calculations to verify that any proposed culvert is properly sized to facilitate drainage to the low point west of the driveway.

(10/8/18 Letter, ECF #16-7, PageID.524). According to Boss engineer Lavanway, obtaining the additional information required four hours of engineering time at $180 per hour ($720 total). (Lavanway Dep. Tr., ECF #63-21, PageID.2386, p. 92).

The Board was scheduled to reconsider the permit application at a public meeting on October 17, 2018. *See* (10/17/18 Minutes, ECF #16-8, PageID.526-40). Prior to the meeting, the Hacks filed this lawsuit in the Oakland County Circuit Court. Later that day, the Township Board voted to approve the permit application subject to the three conditions recommended by Darga. (*Id.* at PageID.540).

## LEGAL STANDARD

This Court may grant a motion for judgment as a matter of law under Fed. R. Civ. P. 50(b) "only if[,] in viewing the evidence in the light most favorable to the

non-moving party, there is no genuine issue of material fact for the jury, and reasonable minds could come to but one conclusion, in favor of the moving party." *Radvansky v. City of Olmsted Falls*, 496 F.3d 609, 614 (6th Cir. 2007) (internal citation omitted). "[I]n entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record . . . [,] draw[ing] all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

Similarly, this Court may grant a motion for a new trial under Fed. R. Civ. P. 59 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] new trial is warranted when a jury has reached a 'seriously erroneous result' as evidenced by: (1) the verdict being against the weight of the evidence; (2) the damages being excessive; or (3) the trial being unfair to the moving party in some fashion, i.e., the proceedings being influenced by prejudice or bias." *Holmes v. City of Massillon, Ohio*, 78 F.3d 1041, 1045-46 (6th Cir. 1996); *see also* Fed. R. Civ. P. 59(a). The movant bears the burden to establish a new trial is warranted. *Clarksville-Montgomery Cty. Sch. Sys. v. U.S. Gypsum Co.*, 925 F.2d 993, 1002 (6th Cir. 1991). The trial evidence is construed in the light most favorable to the non-movant. *Swans v. City of Lansing*, 65 F. Supp. 2d 625, 637-38 (W.D. Mich. 1998).

"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) (citations omitted). "A jury verdict should not be remitted unless it is beyond the maximum damages that the jury reasonably could find to be compensatory for a party's loss." *Denhof*, 494 F.3d at 547 (quotations and citations omitted). A district court should not grant a motion for a remittitur unless a 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." *Denhof*, 494 F.3d at 547.

## LEGAL ARGUMENT

### I. DEFENDANTS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW AND THE JURY'S VERDICT WAS AGAINST THE WEIGHT OF THE EVIDENCE BECAUSE PLAINTIFFS' SUBSTANTIVE DUE PROCESS RIGHTS WERE NOT VIOLATED

"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). Plaintiffs' claims fail because they have no "legitimate claim of entitlement" to deposit fill material on their property without Township

approval. *R.S.W.W., Inc v. City of Keego Harbor*, 397 F.3d 427, 435 (6th Cir. 2005); *see* Mich. Comp. Laws § 247.324; *see also* (Ord. § 32-583, ECF #16-4, PageID.513).

Plaintiffs do not have a fundamental right to access the highway from their property. Nor do they have a specific constitutional right to do so. "Property rights are created and defined by independent sources such as state law and not by the Constitution." *Braun*, 519 F.3d at 573. In *Braun*, there was no cognizable property right because the township had the right to deny the rezoning request. "[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); *see also Silver v. Franklin Twp. Bd. of Zoning Appeals*, 966 F2d 1031 (6th Cir. 1992). The same is true here.

Here, Plaintiffs dumped fill material without Board approval – despite Ordinance § 32-583. *See* (1/2/2019 Material List, ECF #52-12, PageID.1746). Plaintiffs had no property interest in dumping fill material because the Board had discretion to deny their fill and grade permit application. (Ord. § 32-583, ECF #16-4, PageID.513). Moreover, state law and Plaintiffs' permit from the Oakland County Road Commission required compliance with the Township's Ordinances. O.C.R.C. Rule 2.5.16 (Exhibit A, p. 17); *see also* Mich. Comp. Laws § 324.9106(1). Because Plaintiffs failed to identify a constitutionally protected interest entitling them to

deposit material on their property, they failed to state a Fourteenth Amendment substantive due process claim against the Defendants.

Plaintiffs argue that access to the highway was a fundamental right citing two Sixth Circuit opinions. First, *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998) has no relevance to this case because Plaintiffs never alleged that they were exposed to an act of violence by a third party. Second, *Johnson v. City of Cincinnati*, 310 F.3d 484, 503 (6th Cir. 2002) does not support Plaintiffs' argument because the Township did not curtail Plaintiffs' freedom of movement. "[I]t 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, enter a *chosen* dwelling, or gain admittance to a *specific* government building." *Williams v. Town of Greenburgh*, 535 F.3d 71, 75-76 (2d Cir. 2008) (emphasis in original).

The County Road Commission provided Plaintiffs a right to access the highway by issuing a permit to construct a driveway.[2] That permit made Plaintiffs "responsible for obtaining," and required them to "obtain, all required federal, state and local permits, including from the . . . municipal enforcing agency in accordance with Part 91 of Act 451 of 1994." O.C.R.C. Rule 2.5.16 (Exhibit A, p. 17). In turn, Part 91 of Act 451 of 1994[3] enabled the Township to enact ordinances to "provide

[2] Plaintiffs do not allege that the Oakland County Road Commission permit rules or any state law violated their due process rights in any way.
[3] Mich. Comp. Laws § 324.9101, *et seq.*

for soil erosion and sedimentation control on public and private earth changes[.]" Mich. Comp. Laws § 324.9106(1). The statute includes "fill activities" in the definition of "earth change." Mich. Comp. Laws § 324.9101(9). Plaintiffs were free to build (or repair) their driveway but not free to subject adjacent property to run-off water or erosion in violation of Ordinance § 32-574. (Exhibit B). Moreover, Plaintiffs' decision to place their driveway in a flood-prone area of their land did not absolve them of their responsibility to obtain Board approval before engaging in fill activities. (Ord. § 32-583, ECF #16-4, PageID.513).

Additionally, Plaintiffs acknowledged in their Complaint that the driveway was not impassable to all vehicles, but only certain types of vehicles. (Complaint, ECF #1, PageID.26, ¶ 61). There is no indication that Plaintiffs could not walk across the driveway to the highway or access it at other points along the roadway. There was no evidence that the condition of the driveway prevented them from traveling. Flooding limited Plaintiffs' ability to access the highway under certain weather conditions, not Defendants. The Township's actions in enforcing Ordinance § 32-583 did not burden Plaintiffs' right to drive, walk, or otherwise proceed from their home to any other area of the state. Plaintiffs' right to intrastate travel had nothing to do with whether Plaintiffs were entitled to deposit fill material on their property without prior approval. Requiring Plaintiffs to obtain approval from the Board for a fill and grade permit did not destroy their ability to access their property.

Moreover, Plaintiffs ignore the fact that Darga did not approve the Boss plan; he simply "d[id] not object to" it based on the mistaken assumption "that the existing contours on the plan are from the predevelopment of the property and accurately reflect the predevelopment conditions." (8/24/18 Letter, ECF #16-5, PageID.515). The Township's actions throughout were in response to complaints from an adjacent neighbor regarding the grade of Plaintiffs' property and due to Plaintiffs' violation of Ordinance § 32-583 (Filling Operations) and were unrelated to driveway access. Plaintiffs' interest in "effective" driveway access to the highway did not implicate a fundamental right or a specific federal constitutional guarantee.

"Government actions that do not affect fundamental rights . . . will be upheld if . . . they are rationally related to a legitimate state interest." *Seal*, 229 F.3d at 575. Plaintiffs must "negative every conceivable basis which might support it." *Am. Express Travel Related Servs. Co., Inc. v. Kentucky*, 641 F.3d 685, 690 (6th Cir. 2011). If the Township had a "rational speculation linking the regulation to a legitimate purpose, even unsupported by evidence or empirical data[,]" then Plaintiffs' substantive due process claims fail. *Am. Express Travel Related Servs. Co.*, 641 F.3d at 690 (internal quotation marks and citation omitted). "A legislative body 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); *see also Richardson v. Twp. Of Brady*, 218 F.3d 508, 514 (6th Cir. 2000).

The Township's zoning ordinance is related to legitimate governmental interests as were the actions of Township officials taken pursuant to the Ordinance. The Ordinance "shall be held to be the minimum requirements for the promotion of the public safety, health, convenience, comfort, morals, prosperity and general welfare." Ordinance § 32-3 (Exhibit C). These are legitimate governmental interests. *See H.D.V.-Greektown, LLC v. City of Detroit*, 568 F.3d 609, 623 (6th Cir. 2009) (safety and aesthetics are legitimate governmental interests, citing *Metro Media, Inc. v. City of San Diego*, 453 U.S. 490, 509-10 (1981)); *Harris v. Akron Dep't of Public Health*, 10 F. App'x 316, 319 (6th Cir. 2001) (identifying property values, aesthetics and the health, safety and welfare of the public as legitimate governmental interests). Moreover, Mich. Comp. Laws § 125.3201 provided the Township with the authority to adopt ordinances to promote public health, safety, and welfare.

In *Cummins v. Robinson*, the Michigan Court of Appeals rejected claims against township officials, concluding that the township's strict enforcement of building code provisions, even if erroneous, did not state a substantive due process claim. 283 Mich. App. 677. The Court reasoned that even if defendant's application of the building code to plaintiff's circumstances was erroneous, enforcement of the building code requirements still advanced legitimate state interest in protecting the

health, safety and welfare of the public and protected property located in flood-prone areas. *Id*. Even plaintiff's allegations that the township, through its employees, attempted to acquire plaintiff's property at less than fair market value did not state "conscious-shocking conduct." *Id*. Therefore, even if the decision was erroneous, it was made to further legitimate interest and could not be characterized as conscious-shocking. *Id.* at 703.

The same analysis applies here. Township officials received numerous complaints from the owner of the adjacent property, Mamo, that water from Plaintiffs' land was flowing onto his property. *See, e.g.*, (Mamo Emails, ECF #52-6, PageID.1599-1605). Mamo also complained about fill material being dumped on the Hacks' land. *See* (June Emails, ECF #52-9, PageID.1668-69). Even if Township officials were mistaken in the belief that fill materials could affect adjacent property and result in surface water run-off and/or erosion, enforcement of the Zoning Ordinance advanced legitimate governmental interests in public health, safety, and welfare in an area prone to flooding. Issuing a temporary cease and desist order, (Brandt Letter, ECF #41-5, PageID.1079), seeking review of Plaintiffs' engineering plans, and holding hearings at which the Township Board considered Plaintiffs' engineering plans prior to granting approval, (9/19/18 Minutes, ECF #16-6, PageID.520-21); (10/17/18 Minutes, ECF #16-8, PageID.526-40), do not constitute "extreme irrationality."

Undeterred, Plaintiffs argue that the material deposited was not fill[4] and was used to construct the driveway by placing the material under the existing drive to "elevate" it and thus lessen the chance of flooding. *See, e.g.*, (Complaint, ECF #1, PageID.27-28, ¶ 77). Therefore, according to Plaintiffs, no additional permits or approvals were necessary. (*Id*. at PageID.27, ¶¶ 75-76). Contrary to Plaintiffs assertions, Ordinance § 32-2 (Definitions) provides that "filling means the depositing or dumping of any matter onto or into the ground, except common household gardening." (Exhibit D). Plaintiffs were not gardening – they were attempting to raise their land out of swamp-like conditions.

Moreover, Ordinance § 32-28 gave Zoning Administrator Brandt the authority to issue permits and make inspections in the enforcement of the zoning ordinance as necessary to carry out his duties. (Exhibit E). Since Ordinance § 32-574 prohibited the Hacks from allowing runoff surface water to flow onto adjacent property, *see* (Exhibit B); Ordinance § 32-583 required Board approval of fill activities; and the Road Commission's permit rules (specifically, Rule 2.5.16) required compliance with local ordinances, the Hacks' fill activities were not exempt from the Township's oversight. *See also* Mich. Comp. Laws § 324.9101, *et seq*.; *see also* Mich. Comp. Laws § 324.9301, *et seq*.

[4] A photograph confirms, however, that the fill material was spread and graded on either side of the drive, it was not placed underneath the drive to elevate it. (Exhibit F).

The Township's actions did not "shock[] the conscience," and were neither arbitrary nor capricious in the constitutional sense. *Pearson*, 961 F.2d at 1217. If an executive action is challenged (*i.e.*, the Township's application of the ordinance to Plaintiffs' property), the focus is on "whether there was egregious or arbitrary government conduct." *Mettler Walloon, LLC v. Melrose Twp.*, 281 Mich. App. 184, 197, 761 N.W.2d 293 (Mich. Ct. App. 2008). "[O]nly the most egregious official conduct can be said to be arbitrary in the constitutional sense." *Id.* at 197-200; *accord*, *Cummins*, 283 Mich. App. at 701.

Plaintiffs cannot demonstrate that the Township's alleged actions were "so shocking as to shake the foundations of this country." *EJS Props.*, 698 F.3d at 862. In *EJS Props.*, the Court found that actions of a local zoning board did not shock the conscience even though it had solicited a $100,000 bribe in exchange for a favorable ruling. *Id*. If such an extreme abuse of power did not rise to the level of a substantive due process violation, it is inconceivable that the Township Zoning Administrator's actions in issuing a cease and desist order and delaying Plaintiffs from bringing fill material onto their property before the Township Board could review their actions and obtain additional information regarding the potential effect on neighboring property would state such a violation.

An analogous case is *Hussein v. City of Perrysburg*, 617 F.3d 828 (6th Cir. 2010), which also involved a zoning dispute over a driveway. The Court rejected

plaintiffs' claims that their interest in an asphalt driveway was protected by substantive due process and therefore the conduct of city zoning officials did not violate property owners' substantive due process rights. The plaintiffs' allegations did not "implicate specific constitutional guarantees, denial of the driveway does not shock the conscience, and an asphalt driveway is not an interest so rooted in the traditions and conscience of our people as to be fundamental." *Id*. at 833. The same is true in this lawsuit as detailed above. Therefore, this Court should find that none of the actions by Defendants caused any constitutional violation.

**a. Qualified Immunity Bars Plaintiffs' Individual Capacity § 1983 Claims**

This Court erred when it refused to bar Plaintiffs' individual capacity 42 U.S.C. § 1983 claims based on qualified immunity. "[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). The Supreme Court "continue[s] to stress that lower courts 'should think hard, and then think hard *again*,' before addressing both qualified immunity and the merits of any underlying constitutional claim." *D.C. v. Wesby*, 138 S. Ct. 577, 589 n.7 (2018) (emphasis added, internal citation omitted).

The applicability of qualified immunity hinges on "1) whether, viewing the facts in the light most favorable to the plaintiff, the plaintiff has shown that a constitutional violation occurred; and 2) whether the right was clearly established at the time of the violation." *Harris v. City of Circleville*, 583 F.3d 356, 365 (6th Cir.

2009) (internal citation omitted). If no constitutional violation occurred or the right at issue was not clearly established, then the individual Defendants are "immune from suit[.]" *Moldowan v. City of Warren*, 578 F.3d 351, 369 (6th Cir. 2009). This Court may address these prongs in any order. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

To satisfy the clearly-established prong, Plaintiffs must show that "'[t]he contours of the right [were] sufficiently clear [such] that a reasonable official would [have] underst[ood] that what he [was] doing violate[d] that right.'" *Brown v. Lewis*, 779 F.3d 401, 412 (6th Cir. 2015) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). "This inquiry . . . must be undertaken in light of the specific context of the case, not as a broad general proposition." *Katz*, 533 U.S. at 201. This Court "need not . . . find a case in which 'the very action in question has previously been held unlawful,' but, 'in the light of pre-existing law, the unlawfulness must be apparent.'" *Comstock v. McCrary*, 273 F.3d 693, 711 (6th Cir. 2001) (internal citation omitted). "In other words, existing law must have placed the constitutionality of the officer's conduct 'beyond debate.'" *Wesby*, 138 S. Ct. at 589 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

There is no dispute that Plaintiffs generally have a substantive due process right "not to be subjected to arbitrary or irrational zoning decisions." *Pearson*, 961 F.2d at 1217 (internal citation omitted). If the pertinent legal authorities did not

clearly establish in 2017 and/or 2018 that the actions which serve as the basis of Plaintiffs' claims had no substantial relation to public health, safety, and/or welfare, then qualified immunity bars Plaintiffs' individual capacity § 1983 claims. The facts show that the contours of Plaintiffs' alleged rights were not clearly established at the time of the alleged incident.

First, 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. Plaintiffs assert that their fill activities were incidental to – and therefore allegedly permitted by – the building permit and/or Road Commission permit. However, both permits explicitly required Plaintiffs to comply with all local ordinances. *See* (Legal Argument, §§ I(a), *supra*). State law also required compliance with local ordinances. (*Id*.). Since it was clearly established that the Township could regulate Plaintiffs' fill activities, Plaintiffs had no clearly established right as alleged in their pleadings.

Plaintiffs also argue they had the right to exit and enter their property. *See Sandberg*, 174 N.W.2d at 764 (recognizing a "right of access . . . to property abutting a public highway"). However, imposing conditions on filling and grading their property did not destroy their ability to enter onto or leave their property. Plaintiffs do not allege, and there is no evidence to suggest, that Plaintiffs were completely unable to enter or exit their land due to the imposed conditions. In fact, Plaintiffs

alleged that "light trucks and SUVs" could get to and from the property despite the conditions imposed. (Complaint, ECF #1, PageID.26, ¶ 61). Since Plaintiffs cannot show (and have not shown) "some policy, law, or mutually explicit understanding that both confer[ed] the benefit[ ] and limit[ed] the discretion of the [Township] to rescind the benefit[,]" their right to construct their driveway in any manner they wanted (*i.e.*, using filling and grading) after receiving a Building Permit and Road Commission Permit was not clearly established in 2017 and/or 2018. *R.S.W.W.*, 397 F.3d at 435 (internal citation omitted).

Furthermore, it was not clear in 2017 and/or 2018 that imposing conditions on permission to fill and grade land was an "irrational exercise of power" with "no substantial relation to the public health, the public morals, the public safety or the public welfare.'" *Warren v. City of Athens*, 411 F.3d 697, 708 (6th Cir. 2005) (internal citation omitted). Rather, Plaintiffs' own pleadings show that the decision to impose the conditions at issue was the result of public safety concerns: "Milford was allegedly concerned with 'drainage' of water" (Complaint, ECF #1, PageID.23, ¶ 43) and "a significant portion of Plaintiffs' Residential Property remains submerged underwater." (*Id*. at PageID.25, ¶ 57). Avoiding an unsafe situation for the public – *e.g.*, uncontrolled erosion, flooding, and/or drainage of water – necessitated imposing conditions on filling and grading Plaintiffs' land.

Taken together, it was not clearly established in 2017 and/or 2018 that (1) Plaintiffs had the right to dump fill material without prior Board approval; and (2) that it was arbitrary for the Township to impose conditions on Plaintiffs filling and grading plans. Since the specific contours of the alleged right at issue was not clearly established in 2017 and/or 2018, qualified immunity bars Plaintiffs' individual capacity § 1983 claims. By failing to grant Defendants' motions for summary judgment (and/or motions to dismiss) regarding Plaintiffs' individual capacity § 1983 claims, this Court erred as a matter of law.

**b. There Is No Evidence To Support Plaintiffs' Official Capacity § 1983 Claims Because There Is No Evidence Of Deliberate Policymaker Indifference And Milford's Policies Were Not The Moving Force Behind Plaintiffs' Alleged Constitutional Injuries**

In response to Defendants' Second Motion for Summary Judgment, Plaintiffs argued that they sought to hold "Milford, through its official Brandt and through official Board decision-making[,] . . . directly liable for requiring a fill and grade permit and for the requirements . . . in the October 8 letter." (ECF 63, PageID 2039-40). There are four ways to create municipal liability under § 1983: "(1) the [entity's] . . . official policies; (2) actions taken by officials with final decision-making authority; (3) a policy of inadequate training or supervision; or (4) a custom of tolerance or acquiescence of federal violations." *Baynes v. Cleland*, 799 F.3d 600, 621 (6th Cir. 2015). Here, Plaintiffs alleged an injury caused by policymaker decision-making that amounted to official policy. Moreover, Plaintiffs seem to assert

that Milford Ordinance § 32-583 was an official policy, and that their rights were violated when Milford personnel took allegedly injurious action pursuant to that enactment. Under either theory, their claims fail.

First, there is no evidence of Milford's policymakers being deliberately indifferent to Plaintiffs' rights. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986). The alleged right at issue was not clearly established at the time of the incident. 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). As a result, Plaintiffs' *Monell* claim premised upon policymaker indifference fails as a matter of law.

Second, Plaintiffs failed to show that a Milford policy was the moving force behind their alleged constitutional injury. *See Bd. Of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 404 (1997). The evidence leaves no doubt that Milford's policies (whether through policymaker decision-making or implementation of § 32-583) were *not* the moving force behind Plaintiffs' alleged injuries. Instead, the evidence shows that the alleged injuries are the result of Plaintiffs' decision-making, bad weather, and flooding. As a result, this Court erred when it permitted Plaintiffs' § 1983 claims against Milford (including official capacity claims against the Board, Green, and Brandt) to proceed to trial.

## II. THE DAMAGES AWARDED BY THE JURY WERE EXCESSIVE

Defendants are entitled to either a new trial or remittitur because the jury's determination of damages was excessive. Since no substantive due process violation occurred, the jury was not entitled to award any damages to Plaintiffs. A new trial is appropriate "when a jury has reached a 'seriously erroneous result' as evidenced by: . . . the damages being excessive[.]" *Holmes*, 78 F.3d at 1045-46; *see also* Fed. R. Civ. P. 59(a). Similarly, remittitur is appropriate when the jury's verdict "is beyond the maximum damages that the jury reasonably could find to be compensatory for a party's loss." *Denhof*, 494 F.3d at 547. Since no substantive due process violation occurred, the jury's award in this lawsuit is "beyond the range supported by proof;" "shock[s] the conscience;" and is "the result of mistake." *Id*. The maximum range for damages was zero dollars because no substantive due process violation occurred. Any award above zero dollars was excessive, the result of a mistake, and shocks the conscience if left uncorrected. Additionally, the jury cannot impose punitive damages against the Board because the claims against it were merely official capacity § 1983 claims (rather than individual capacity § 1983 claims).

### a. The Jury's Compensatory Damages Award Was Excessive

The Jury awarded Joel and Wren Hack $10,000 *each* for compensatory damages. (Jury Verdict, ECF #75, PageID.2572). Yet, even when assuming *arguendo* that Defendants breached Plaintiffs' substantive due process rights, their

only economic damage was $720. (Lavanway Dep. Tr., ECF #63-21, PageID.2386, p. 92) (obtaining the additional information to receive a fill and grade permit required four hours of engineering time at $180 per hour). At a minimum, one of the two awards of $10,000 should be remitted so as to avoid Plaintiffs collecting duplicative damages. Moreover, the jury's award of emotional distress damages ($119,000 for Joel and $55,00 for Wren) have no basis in fact and are therefore excessive. Importantly, any alleged deprivation was justified as explained above. As a result, "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).

**b. Municipal Entities (Like the Township Board) Are Not Subject to Punitive Damages**

The Court erred by allowing punitive damages against "Defendant Milford Board." *See* (Verdict Form, ECF #75). Municipalities sued under § 1983 are immune to punitive damages claims. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981). If a claim against the Township Board "is, in all respects other than name, to be treated as a suit against" the Township itself, then the Board is not subject to the imposition of punitive damages. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Since the facts show that Plaintiffs' allegations against the Board are official capacity § 1983 claims, the Board is immune to punitive damages.

Punitive damages are only available in individual capacity § 1983 claims. *City of Newport*, 453 U.S. at 271. Plaintiffs must give clear notice of their intention to

make an individual capacity § 1983 claim. *Moore v. City of Harriman*, 272 F.3d 769, 775 (6th Cir. 2001). Whether a § 1983 claim is made in an individual or official capacity is determined by "a course of proceedings test[.]" *Rodgers v. Banks*, 344 F.3d 587, 594 (6th Cir. 2003). This test weighs "the nature of the plaintiff's claims, requests for compensatory or punitive damages, and the nature of any defenses raised in response to the complaint, particularly claims for qualified immunity, to determine whether the defendant had actual knowledge of the potential for individual liability," in addition to whether subsequent pleadings put the defendant on notice of the capacity in which they were being sued. *Id*. (quoting *Shepherd v. Wellman*, 313 F.3d 963, 968 (6th Cir.2002)). If there is no evidence of the entire Board being on notice of individual capacity § 1983 claims, then the claims against the Board are official capacity § 1983 claims.

The Compliant makes allegations against the Charter Township of Milford; the Township of Milford Board; Supervisor Green, in his personal and official capacity; and Zoning Administrator Brandt, in his personal and official capacity. *See* (Complaint, ECF #1, PageID.18). Plaintiffs identified Milford Township as "a Michigan municipal corporation" and the Township Board as "a governmental unit, specifically a public body of Defendant Milford." (Complaint, ECF #1, PageID.19, ¶¶ 3-4). Claims against the Board were limited to the actions taken by the Board as a whole governmental body, not actions by individual board members. *See*

(Complaint, ECF #1, PageID.25, ¶¶ 54-56); *see also* (Plaintiffs' Response to Second MSJ, ECF #63, PageID.2039-2040) (Arguing that Plaintiffs were not proceeding under a *respondeat superior* theory, but instead that the Township should be liable through "its official Brandt and through official Board decision-making[.]").

Because vicarious liability is inapplicable in actions brought under § 1983, *see, e.g.*, *Monell v. Dept. of Soc. Servs*., 436 U.S. 658, 691 (1978), pleading an individual capacity claim required Plaintiffs to allege that each government-official defendant, through his or her own individual actions, violated the Constitution. *Moore*, 272 F.3d at 775. Since the claims against the Board do not allege how *each member* of the Board, through his or her own individual actions, violated the Constitution, the claims against the Board are official capacity § 1983 claims. *Monell*, 436 U.S. at 691-92.

Yet, at the conclusion of proofs at trial, Plaintiffs' requested, and the court permitted "Defendant Milford Board" to be included in the punitive damage section of the Verdict Form over Defendants' objection.[5] *See* (ECF #75, PageID.2573). Plaintiffs failed to identify any authority for permitting punitive damages against the Township. Thus, allowing punitive damages to be awarded against the Township

[5] Plaintiffs' Complaint included a request for punitive damages without identifying the specific Defendants for which the relief was sought. (Complaint, ECF #1, PageID.36, ¶ I).

Board was plain error and $200,000.00 in punitive damages awarded must be stricken from the judgment. (ECF #75, PageID.2573).

## CONCLUSION

WHEREFORE Defendants CHARTER TOWNSHIP OF MILFORD; TOWNSHIP OF MILFORD BOARD; DONALD D. GREEN; and TIMOTHY C. BRANDT respectfully ask that this Honorable Court grant this Motion, set aside the jury's verdict, rescind any injunctive or declaratory relief in Plaintiffs' favor, enter judgment in favor of Defendants, and dismiss Plaintiffs' claims with prejudice.

Respectfully submitted,

O'CONNOR, DEGRAZIA, TAMM & O'CONNOR

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 3, 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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