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STATE OF MICHIGAN

COURT OF APPEALS

DANIEL STOMBER,

Plaintiff-Appellant,

v

SANILAC COUNTY DRAIN COMMISSIONER,

Defendant-Appellee,

and

COUNTY OF SANILAC,

Defendant.

UNPUBLISHED
December 19, 2019

No. 347360
Sanilac Circuit Court
LC No. 18-037518-CZ

Before: RONAYNE KRAUSE, P.J., and CAVANAGH and SHAPIRO, JJ.

PER CURIAM.

Plaintiff, Daniel Stomber, appeals by right the trial court's grant of summary disposition in favor of defendant, the Sanilac County Drain Commissioner.[1] This case arises out of the destruction of most of a double row of trees plaintiff planted approximately twenty years previously along the southern portion of his property. The trees were immediately to the north of a drainage ditch that ran along the edge of plaintiff's property, adjacent to the road. It is not disputed that one row of the trees was inside the drain easement. The parties dispute whether the other row of trees was within the easement. Plaintiff also contends that the drain commissioner breached a contract he entered into with plaintiff to allow plaintiff to perform the maintenance himself. We affirm.

[1] The trial court separately granted summary disposition in favor of Sanilac County, and plaintiff has not sought to appeal from that decision. We will therefore address the drain commissioner as the sole defendant in this matter.

I. FACTUAL BACKGROUND

Plaintiff owns an 80-acre parcel of property, and the Stony Creek Drain (the Drain) runs through the southern edge of the property, parallel and adjacent to the road. In 1929, predecessor owners of plaintiff's property executed two "release of right of way" conveyances in favor of Sanilac County, conveying rights to property on either side of the Drain for purposes of "deepening, widening, straightening and extending" the Drain (collectively, "the Easement"). As will be discussed, the releases specifically describe fifty-foot strips of land on either side of the center-line of the Drain, but also contain less-specific further conveyance language. A significant issue in this matter is whether the Easement is precisely limited to fifty feet from the center-line of the Drain, or whether the Easement encompasses any land outside those fifty feet.

In approximately the mid-1990s, shortly before the previous time the Drain was maintained, plaintiff planted several hundred pine trees in two rows along the south of his property to serve as wind barriers and for erosion control. One row was planted within the fifty-foot area, the other row was planted a few feet beyond the edge of that area. According to the drain commissioner, when the Drain was maintained in 1995, plaintiff's trees were still so small that work was performed around them. The parties agree that drain maintenance generally occurs approximately every twenty years.

In 2014, the drain commissioner commenced maintenance activities on the Drain. He informed plaintiff that the trees were interfering with his ability to perform the maintenance and therefore constituted "an obstruction." The drain commissioner advised plaintiff in a "notice of violation" that plaintiff either needed to remove the trees or pay an estimated $17,300 plus additional disposal costs for work to be performed around the trees. Otherwise, the drain commissioner would remove the trees and hold plaintiff responsible for the cost of that removal. Plaintiff discussed the situation with the drain commissioner, and the drain commissioner proved amenable to plaintiff performing the drain maintenance himself at no charge to the county. The precise nature of that amenability, however, is contested.

On April 28, 2015, a meeting was held at the drain commissioner's office between the drain commissioner, plaintiff, and Wade Kappen[2] of Kappen Excavating, LLC. Kappen provided an estimate to complete the drain maintenance work from Deckerville Road. The drain commissioner wrote "OK" on the Kappen estimate, initialed it, and dated it. At the same time, plaintiff signed a copy of the notice of violation that had the $17,300 cost struck through, and "Contract Pending w/ Kappen Exc LLC" handwritten by the drain commissioner in the margin. According to plaintiff, the above documents show that the drain commissioner formally contracted with plaintiff and "approved and authorized" Kappen to perform the work at plaintiff's expense. According to the drain commissioner, his approval was conditional upon plaintiff or Kappen obtaining permission from the road commission; providing proof that Kappen was qualified, insured, and bonded; and Kappen entering into a contract with the

[2] There is also a Rick Kappel, who owned another excavating company that was ultimately retained by the drain commissioner to perform work on the drain.

drainage district. The drain commissioner contends that plaintiff's signature on the notice of violation shows that plaintiff knew that no agreement had been entered into.

On October 15, 2015, Kappen Excavating came to plaintiff's property, whereupon the drain commissioner forbade Kappen from performing any work. The drain commissioner contends that he prevented Kappen from working because Kappen had not provided the required insurance or bond, had not entered into a required contract with the drainage district, and had not obtained the necessary permission from the road commission to work from the road; therefore, Kappen was not authorized or allowed to perform the work. Plaintiff has never offered any evidence that Kappen obtained or provided any of the above approvals. The drain commissioner had its own contractor, Kappel Excavating, perform maintenance work on the Drain.

The drain commissioner testified that he made an "effort to save as many trees as possible" by having Kappel sub-contract some excavation work to Stringer Excavating ("Stringer"). Unlike Kappel, Stringer had a special excavator that lacked a tail-mounted counterweight, which enabled it to maneuver around at least some of plaintiff's trees.[3] The drain commissioner explained that Stringer's excavator cost more to use,[4] he never used such equipment before or since, and "the sole purpose for that" was "to save as many trees as possible." According to the drain commissioner,

> Only those trees that needed to be removed from the Property to complete the Project were removed. All trees removed from the Property were either within the express fifty-foot drain easement or within the permitted maintenance area around the easement and obstructed the ability to maintain the drain.

Kappel removed the entire first row of trees within the explicit fifty feet of the easement, and Stringer removed approximately half of the second row of trees. Plaintiff implicitly conceded that the drain commissioner was authorized to remove the first row of trees, but asserted that the drain commissioner had no right to the second row of trees.

Plaintiff contended that the actual work performed on the Drain was also improper. Specifically, plaintiff contended that the Drain ditch was improperly widened and improperly shaped. As a consequence, plaintiff contends that water no longer flows properly through the ditch, resulting in stagnant water pooling on his property, in contrast to "all other ditches in the Stoney Creek Drain." He clarified that water only overflowed the ditch onto his land in one area when it rained, but portions of the ditch had become effectively "retention ponds" and were

[3] No direct evidence, other than the drain commissioner's word, has been introduced tending to show that the drain maintenance really could not be performed without either working from the road or removing most of plaintiff's trees. However, that issue also does not appear to be meaningfully disputed, particularly because it appears that Kappen also would have needed to work from the road to perform the maintenance pursuant to plaintiff's asserted contract.

[4] The drain commissioner passed the cost on to plaintiff.

infested with mosquitoes. Plaintiff contends that he advised the drain commissioner "that the drainage ditch was improperly cut" and that he was ignored.

Plaintiff also contended that the drain commissioner specifically targeted him for selective enforcement. In fact, 31 parcels in the drain district had trees cut for obstructing access to the drain, but plaintiff was the only landowner notified of a violation and charged extra money beyond the general assessment. The drain commissioner explained that plaintiff was the only landowner notified of a violation because he was the only landowner who challenged the maintenance. The drain commissioner sent an invoice to plaintiff for $8,631.90 in costs, including the extra expense of Stringer's excavator, and $1,619.90 in legal fees. The Drain Commissioner placed a lien in the amount of $10,215.80 on plaintiff's property, which plaintiff paid.

Plaintiff commenced the instant action asserting numerous claims, several of which he withdrew or has not pursued on appeal. Plaintiff pursues claims for inverse condemnation or uncompensated taking of his property, violation of due process, and breach of contract. The trial court implicitly concluded that the second row of trees was outside the Easement, but because they directly abutted the Easement to the extent that their branches overhung the easement, they were within a "reasonable area" for maintenance pursuant to *Kiesel Intercounty Drainage Bd v Hooper*, 148 Mich App 381, 385-387; 384 NW2d 420 (1986). The trial court therefore concluded that plaintiff could not recover against the drain commissioner on any theory regarding the trees. The trial court also concluded that plaintiff had only provided evidence that the drain commissioner was "agreeable to" a contract, not that a contract had actually been entered into. The trial court therefore granted summary disposition in favor of the drain commissioner, and this appeal followed.

II. STANDARD OF REVIEW

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to "determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, we consider all evidence submitted by the parties in the light most favorable to the non-moving party and grant summary disposition only where the evidence fails to establish a genuine issue regarding any material fact. *Id*. at 120. Under MCR 2.116(C)(7), where the claim is allegedly barred, the trial court must accept as true the contents of the complaint, unless they are contradicted by documentary evidence submitted by the moving party. *Id*. at 119. Under MCR 2.116(C)(8), the reviewing court considers only the pleadings and grants summary disposition only if all well-pleaded factual allegations, viewed in the light most favorable to the non-moving party, fail to make out a legally enforceable claim. *Id*. at 119. "This Court ordinarily affirms a trial court's decision if it reached the right result, even for the wrong reasons." *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 150; 624 NW2d 197 (2000).

Issues involving the interpretation of statutes or contracts are also reviewed de novo as questions of law. *Johnson v QFD, Inc*, 292 Mich App 359, 364; 807 NW2d 719 (2011). The language in an easement is construed in the same manner as a contract, and if the plain language used in the instrument is unambiguous, the intent of the parties must be ascertained from that

language. *Wiggins v City of Burton*, 291 Mich App 532, 551; 805 NW2d 517 (2011). The courts may consider extrinsic evidence to determine the scope of an easement if the language is ambiguous. *Blackhawk Devel Corp v Village of Dexter*, 473 Mich 33, 48-49; 700 NW2d 364 (2005). Factual findings of the trial court are generally reviewed for clear error, and "the appellate court must defer to the trial court's view of the facts unless the appellate court is left with the definite and firm conviction that a mistake has been made by the trial court." *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 472; 719 NW2d 19 (2006).

III. AUTHORITY TO REMOVE TREES OUTSIDE THE EASEMENT

As an initial matter, we agree with the parties and the trial court that *Kiesel* is controlling authority in this matter. *Kiesel* was decided before November 2, 1990, so it is not binding precedent pursuant to the "first-out rule." MCR 7.215(J)(1). However, as a published opinion, it "has precedential effect under the rule of stare decisis." MCR 7.215(C)(2).

In *Kiesel*, the defendant landowners challenged the validity of a 1905 release of right-of-way in favor of the plaintiff drainage board. *Id.* at 382-383. In relevant part, the defendants argued that the person who signed the 1905 release was not the person who actually owned the property at the time, and they contended that the drain commissioner's easement was limited only to the 20-foot physical width of the drain. *Id.* at 383-384. This Court concluded that pursuant to the first sentence of MCL 280.6,[5] the drain commissioner did not *need* a strictly valid release to be entitled to a "reasonable area for the maintenance" of a visibly existing public drain. *Id.* at 384-386. This Court observed that a trial-level court should ordinarily determine, as a factual matter, what would be a reasonable scope and extent of such an easement under the circumstances. *Id.* at 386-387. However, the parties in that matter "agree[d] that the specifications of the original drain project called for, and the 1905 release of a right-of-way granted, a distance of three rods [(49.5 feet)] from the center of the drain for the purpose of maintenance." *Id.* at 387. This Court held that under the statute, the description of the easement in the release established the scope and extent of the drain commissioner's right-of way despite the release's technical deficiencies. *Id.*

Plaintiff correctly points out that the facts in the instant matter are significantly distinguishable from those in *Kiesel*. In *Kiesel*, the relevant acts undisputedly occurred strictly within that three-rod area, and the drain commissioner disclaimed any desire to go outside that area. *Kiesel*, 148 Mich App at 383. In contrast, plaintiff tacitly admits here that the drain commissioner was entitled under the Easement to remove the trees within the Easement, but rather asserts claims regarding the trees *outside* the Easement. Pursuant to the end of the first sentence of MCL 280.6, drain commissioners may not exceed or alter the rights granted in a written easement or right of way. Thus, *Kiesel* clearly held, and we agree, that if a release precisely and explicitly describes an easement or right-of-way, that description conclusively establishes the "reasonable maintenance area" under the circumstances. Furthermore, "a local unit of government may not significantly expand the scope of an existing drainage easement." *Wiggins*, 291 Mich App at 549.

[5] MCL 280.6 was enacted by 1968 PA 208, and it has not been amended since that time.

The trial court wrongly reasoned that the drain commissioner was empowered to remove plaintiff's second row of trees because they were located "a mere few feet" from the edge of the Easement. This is a misreading of *Kiesel* and contrary to the law. If the trees were located outside the Easement, the drain commissioner had no authority to destroy them, no matter how *de minimus* the distance outside the Easement. Nevertheless, because, as we will discuss, the Easement actually extends beyond the fifty feet specifically described in the right-of-way releases, the trial court ultimately arrived at the correct outcome.[6]

IV. ACTUAL EXTENT OF THE EASEMENT

Importantly, the 1929 right-of-way releases in this matter contain formal descriptions of the center-line of the Drain, explicitly convey rights to a fifty-foot strip of land on either side of that line, and *also* contain the following language *after* those formal descriptions:

> This conveyance is based upon the above described line of Route and shall be deemed to include the extreme width of said drain as shown in the survey thereof, to which reference is hereby made for a more particular measurement, and includes a release for all claims to damages in any way arising from or incident to the opening and maintaining of said drain across said premises, *and also* sufficient ground on either side of the center line of said drain for the construction thereof and for the deposit of the excavations therefrom. [(emphasis added)]

A "survey" can be "[t]he measuring of a tract of land and its boundaries and contents." *Black's Law Dictionary (8th ed)*. The drafters of the releases would have understood the formal property descriptions to be the "surveys" referenced in the above language.

Contracts should be construed to avoid rendering any portion "surplusage or nugatory." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). If the "and also" clause was merely a reference back to the same fifty-foot strips, the clause would be surplusage or nugatory; it would also make little grammatical sense. Thus, the language "and also" unambiguously signifies the conveyance of something beyond or in addition to the formally-described fifty-foot strips. Furthermore, the stated purposes of construction and deposition mirrors language in the formal descriptions, which the parties do not dispute includes maintenance. In general, similar language, especially if found in provisions addressing similar subject-matter, should be construed similarly. *Stamadianos v Stamadianos*, 425 Mich 1, 13-14; 385 NW2d 604 (1986), cf. *Attorney General v Public Service Comm*, 429 Mich 248, 255-256; 414 NW2d 687 (1987). Therefore, the plain language of the right-of-way releases includes rights to "sufficient ground on either side of the center line of" the Drain for the performance of necessary drain maintenance.

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[6] We presume, although we need not decide, that if the Easement had been limited to only fifty feet from the center-line of the Drain, the drain commissioner would nevertheless have had the authority to remove any branches overhanging the Easement.

The "and also" clause does not provide any specificity. However, pursuant to *Kiesel*, the determination of what would be a reasonable maintenance area under the circumstances is therefore a factual question for the trial court. *Kiesel*, 148 Mich App at 386-387. Here, the trial court misunderstood *Kiesel* as permitting it to determine a reasonable maintenance area beyond the boundary of the Easement. Under *Kiesel*, the reasonable maintenance area is necessarily coterminous with any documented formal easement. However, because the Easement explicitly includes "sufficient ground" for drain work, the trial court correctly understood that it was required to determine a reasonable maintenance area. If a reasonable maintenance area extends beyond fifty feet from the center-line of the Drain, then the Easement is coterminous with that area. This Court will affirm a correct result, even if the trial court relied on flawed reasoning. *Wickings*, 244 Mich App at 150.

Under the circumstances, we are not able to find clear error in the trial court's finding that plaintiff's second row of trees was within the "reasonable maintenance area." There was no real dispute that the second row of trees had been planted within a few feet of the fifty-foot boundary. They had grown to the point where their trunks abutted the fifty-foot boundary, and their branches extended into the fifty-foot area. Importantly, there was also no factual dispute that unless the drain commissioner worked from the road, which would require permission from the road commission, only some of the trees could be worked around, and even then only by resorting to special equipment. We are constrained to conclude that the drain commissioner acted within his lawful authority and the scope of the Easement by removing some of plaintiff's second row of trees.

V. INVERSE CONDEMNATION OR UNCOMPENSATED TAKING

A property owner who has been deprived of the use or possession of property is entitled to be compensated for the value of that property. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 294-295; 769 NW2d 234 (2009). If the landowner's property has been permanently and physically occupied, a taking will be deemed to have occurred irrespective of the benefit to the public or, implicitly, the legal propriety of the government's conduct. See *Tolksdorf v Griffith*, 464 Mich 1, 7-8; 626 NW2d 163 (2001). A governmental regulation that falls short of physical occupation may also effectuate a taking, and whether the governmental entity targeted a particular landowner is merely one of several considerations. See *K&K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 526-529; 705 NW2d 365 (2005); see also *Heinrich v City of Detroit*, 90 Mich App 692, 697; 282 NW2d 448 (1979). A property owner is entitled to compensation for property that is damaged short of being fully taken. *Merkur Steel Supply Inc v City of Detroit*, 261 Mich App 116, 129; 680 NW2d 485 (2004). We therefore reject as incorrect the drain commissioner's argument that an inverse condemnation or unlawful taking case *always* requires a plaintiff to prove that the applicable governmental entity abused its powers.

However, in a "de facto" takings case, where the government has not actually touched or regulated a plaintiff's property but allegedly harmed the property indirectly, the plaintiff must prove an abuse of governmental powers. Where the property has not been permanently occupied, the landowner must prove that the government's conduct actually harmed the use, value, or enjoyment of the property. *Heinrich*, 90 Mich App at 697; *Merkur Steel*, 261 Mich App at 129-132; *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 548-549; 688

NW2d 550 (2004). In *Heinrich*, this Court articulated the requirement of an abuse of governmental powers in the contexts of governmental entities announcing the pendency of condemnation proceedings and then delaying the process to the detriment of the property owners in the meantime. *Heinrich*, 90 Mich App at 695-697; relying on *Sayre v City of Cleveland*, 493 F 2d 64, 65-66, 69-70 (CA 6, 1974) and *In re Elmwood Park Project Section 1, Group B*, 376 Mich 311, 313-317, 318; 136 NW2d 896 (1965). Recent case law citing the abuse of governmental powers requirement has also been in the context of "de facto" takings. *Hinojosa*, 263 Mich App at 548-549; *Merkur Steel*, 261 Mich App at 129-131.

We conclude that the instant matter is closely analogous to a "de facto" takings claim. We accept that plaintiff has articulated several valid harms. He contends that the ditch now overflows onto his property, although he conceded that it only does so in one place and occasionally, and it is infested with mosquitoes. He implicitly contends that the removal of his trees exposes his property to soil and wind erosion. Finally, he asserts that the loss of the trees diminished the total value of his property, although he conceded that he could not articulate that value and had not even attempted to ascertain that value. We presume plaintiff has indeed suffered a loss of value, use, or enjoyment of his property as a consequence of the drain commissioner's actions. However, plaintiff's property has clearly not been actually or permanently occupied, and plaintiff has not provided any evidence from which a particular diminution in value could be calculated. We therefore agree with the drain commissioner that under the circumstances, plaintiff must show that the drain commissioner abused his powers. As discussed, the drain commissioner did not abuse his powers, so plaintiff cannot prevail on an inverse condemnation or uncompensated takings claim.

VI. DUE PROCESS OR SELECTIVE ENFORCEMENT

A violation of substantive due process generally requires governmental conduct that is irrational and arbitrary. *Bevan v Brandon Twp*, 438 Mich 385, 391; 475 NW2d 37 (1991), amended in part on other grounds 439 Mich 1202 (1991). Stated another way, a governmental entity's act will not violate substantive due process unless "there is no room for a legitimate difference of opinion concerning its reasonableness." *Robinson v City of Bloomfield Hills*, 350 Mich 425, 432; 86 NW2d 166 (1957). More recently, this Court has adopted a "shocks the conscience" standard. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 197-213; 761 NW2d 293 (2008). A government actor using its powers "as an instrument of oppression" will violate substantive due process. *Id*. at 198-199 (quotation omitted). However, government conduct that is merely incorrect or incompetent will not. *Id*. at 206. As discussed, the drain commissioner acted within his lawful authority, and it does not appear that he destroyed any trees unnecessarily. The drain commissioner brought in special equipment capable of working around some of plaintiff's trees. Because the drain commissioner simply passed the cost on to plaintiff, we reject his implicit contention that he engaged in any kind of charity. Nevertheless, the fact that he went to the trouble of finding such equipment strongly suggests that he did not destroy any trees unnecessarily.

Plaintiff contends that the drain commissioner selectively enforced his powers against plaintiff. The drain commissioner sent a notice of violation only to plaintiff and billed only plaintiff beyond the general assessment, despite numerous other properties having tree obstructions in their right of ways, because plaintiff "was the only one that challenged the

maintenance." However, all of the other property owners simply allowed the drain commissioner to perform the work and remove the obstructions. The drain commissioner apparently believed that, as a consequence, only plaintiff's property was actually in violation of the Drain Code. It is not selective enforcement to give disparate treatment to a property owner who acts in a disparate manner. Furthermore, MCL 280.421 states that drain commissioners are required to remove any drain obstructions, and, unless the obstruction was due to natural causes, are also required to impose upon "the person causing such obstruction" the cost of the removal and the cost to the commissioner. The drain commissioner was not only authorized, but required to impose the costs of removing the trees upon plaintiff. Plaintiff aptly points out that he was billed a startling amount of money, but he has not asserted that any of the included charges were inaccurate, artificially inflated, or otherwise a sham.

Finally, plaintiff argues that the drain commissioner improperly widened the ditch and impeded the flow of water through the ditch. We think plaintiff has successfully articulated a claim that the drain commissioner's maintenance was incompetent. However, even if we agreed that the maintenance actually was incompetent, which could certainly be harmful, incompetence is not an abuse of governmental power. *Mettler Walloon*, 281 Mich App at 206. We cannot conclude on this record that the drain commissioner abused or selectively enforced his powers to violate plaintiff's due process rights.

VII. BREACH OF CONTRACT

"A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach." *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014). Plaintiff bafflingly protests that he does not, in fact, have the burden of proving the existence of a contract. Plaintiff argues that the trial court improperly relied on a case that in turn relied on *Hammel v Floor*, 359 Mich 392, 400; 102 NW2d 196 (1960), which addressed *oral* agreements. There is nothing special about oral contracts in that regard; it is incumbent upon the party relying on any kind of contract to first prove the contract's existence. See *Strong v Hercules Life Ins Co*, 284 Mich 573, 578; 280 NW 55 (1938). It may be that the existence of a contract is not seriously disputed in most cases where a writing exists. However, in this case, the nature of the available writings is disputed. The trial court correctly held that plaintiff had the burden of proving that he and the drain commissioner entered into a contract.

The parties have not provided complete transcripts of either party's deposition, and the testimony we have been provided is not helpful. Plaintiff testified that he believed the drain commissioner had approved Kappen performing the drain maintenance work, whereas the drain commissioner testified that he agreed to plaintiff's proposal subject to certain conditions. The only objective documentary evidence is the drain commissioner writing "OK" on and initialing an estimate from Kappen, and writing "contract pending" on the signed notice of violation. Plaintiff contends that the drain commissioner therefore obviously entered into a contract. We disagree.

The trial court correctly observed that the word "pending" indicates incompleteness. See *Grievance Administrator v Fieger*, 476 Mich 231, 249; 719 NW2d 123 (2006). Writing "contract pending" shows only that a contract was contemplated or in the process of negotiation,

not that a contract existed. The provision of an estimate *might* be considered an offer to a contract under some circumstances. See *Guthrie v Auto-Owners Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued July 25, 2017 (Docket No. 332199), unpub op at pp 3-4.[7] Furthermore, initials may be deemed a sufficient signature. *Ismon v Loder*, 135 Mich 345, 351; 97 NW 769 (1904). Thus, Kappen's estimate could have been an offer that the drain commissioner accepted. Nevertheless, the estimate stated on its face that it was "an estimate only" and that the price was subject to change, suggesting that it was merely an offer to negotiate a contract. See *Dyno Constr Co v McWayne Inc*, 198 F 3d 567, 573-574 (CA 6, 1999). Furthermore, the drain commissioner did not sign on the signature line, suggesting that his initials were an acknowledgement rather than an acceptance. In any event, any contract so created would have been between Kappen and the drain commissioner only. Plaintiff does not assert that he was an intended third-party beneficiary of any such contract. Therefore, the trial court correctly determined that plaintiff had not established a genuine question of fact whether he and the drain commissioner entered into a contract.

Affirmed. We direct that the parties shall bear their own costs, a question of public importance being involved. MCR 7.219(A).

/s/ Amy Ronayne Krause
/s/ Mark J. Cavanagh
/s/ Douglas B. Shapiro

[7] Unpublished decisions of this Court are not binding. MCR 7.215(J)(1). However, although disfavored, an unpublished opinion may be considered persuasive if no published authority exists. MCR 7.215(C)(1). *Guthrie* squarely explains how the estimate in that case satisfied all of the elements of a valid offer that could be immediately accepted by an offeree.