STATE OF MICHIGAN

COURT OF APPEALS

THEODORE SLICER,

Plaintiff-Appellee/Cross-Appellee,

v

CITY OF ST. JOHNS,

Defendant/Cross-Plaintiff-Appellant/Cross-Appellee,

and

COUNTY OF CLINTON,

Defendant,

and

CLINTON COUNTY ROAD COMMISSION,

Defendant/Cross-Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
December 6, 2012

No. 298068
Clinton Circuit Court
LC No. 09-010506-CK

Before: TALBOT, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

Defendant City of St. Johns appeals by right the trial court's order denying its motion for summary disposition of plaintiff Theodore Slicer's claims of inverse condemnation and negligent design of a storm water sewer system. Defendant Clinton County Road Commission cross-appeals by right the same order in which the trial court also denied its motion for summary

disposition.[1] For the reasons more fully explained below, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

The City and the Commission first argue that the trial court erred when it refused to dismiss Slicer's claim premised on a theory of negligent design under the sewage disposal event exception to governmental immunity. This Court reviews de novo a trial court's decision on a motion for summary disposition. *State Farm Fire & Casualty Co v Corby Energy Services, Inc*, 271 Mich App 480, 482; 722 NW2d 906 (2006). This Court also reviews de novo the proper interpretation of statutes, such as those governing governmental immunity. *Id.* at 482-483.

The City moved for summary disposition under MCR 2.116(C)(7) and (C)(10), and the Commission moved for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10). The trial court did not specify which subsection it applied when deciding the motions. Because defendants raised governmental immunity as a defense, we conclude that review is appropriate under MCR 2.116(C)(7). See *Willett v Waterford Twp*, 271 Mich App 38, 47; 718 NW2d 386 (2006).

Summary disposition is appropriate under MCR 2.116(C)(7) if a claim is barred on the basis of "immunity granted by law." MCR 2.116(C)(7). In order to avoid summary disposition under MCR 2.116(C)(7), the plaintiff must plead facts in avoidance of immunity. *State Farm*, 271 Mich App at 482. A party may support a motion under MCR 2.116(C)(7) with affidavits, depositions, admissions, or other documentary evidence. *Id.* at 482-483. "In reviewing a (C)(7) motion, a court must accept all well-pleaded allegations as true and construe them in favor of the nonmoving party." *Tellin v Forsyth Twp*, 291 Mich App 692, 698; 806 NW2d 359 (2011).

"A governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." *Mack v Detroit*, 467 Mich 186, 197-198; 649 NW2d 47 (2002), citing MCL 691.1407(1). Because governmental immunity is a characteristic of government, "[a] plaintiff filing suit against a governmental agency must initially plead his claims in avoidance of governmental immunity." *Odom v Wayne Co*, 482 Mich 459, 478-479; 760 NW2d 217 (2008). Requiring a plaintiff to plead in avoidance of immunity serves "a central purpose of governmental immunity, that is, to prevent a drain on the state's financial resources, by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity." *Mack*, 467 Mich at 203 n 18. Pleading in avoidance of immunity may be accomplished by stating a claim that falls within a statutory exception to immunity. *Id*. at 199.

The sewage disposal system event exception to governmental immunity is codified at MCL 691.1416 to MCL 691.1419. The purpose of this exception is "'[t]o afford property owners, individuals, and governmental agencies greater efficiency, certainty, and consistency in the provision of relief for damages . . . caused by a sewage disposal system event. . . .'" *Willett*, 271 Mich App at 48, quoting MCL 691.1417(1).

[1] Defendant Clinton County is not involved in this appeal.

> Under MCL 691.1417(2), "[a] governmental agency is immune from tort liability for the overflow or backup of a sewage disposal system unless the overflow or backup is a sewage disposal system event and the governmental agency is an appropriate governmental agency." A "sewage disposal system event" is defined, in pertinent part, as "the overflow or backup of a sewage disposal system onto real property." MCL 691.1416(k). An "appropriate governmental agency" is defined as "a governmental agency that, at the time of the sewage disposal system event, owned or operated, or directly or indirectly discharged into, the portion of the sewage disposal system that allegedly caused damage. . . ." MCL 691.1416(b). [*Willett*, 271 Mich App at 48.]

A "sewage disposal system" includes storm sewers and storm water drain systems. MCL 691.1416(j).

A claimant may seek compensation from a governmental agency for property damage or physical injury caused by a sewage disposal event by showing all the following:

> (a) The governmental agency was an appropriate governmental agency.
>
> (b) The sewage disposal system had a defect.
>
> (c) The governmental agency knew, or in the exercise of reasonable diligence should have known, about the defect.
>
> (d) The governmental agency, having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect.
>
> (e) The defect was a substantial proximate cause of the event and the property damage or physical injury. [MCL 691.1417(3).]

In addition, the claimant must show that he or she complied with the notice requirements stated under section 19. MCL 691.1417(4). The relevant notice provisions provide:

> (1) Except as provided in subsections (3) and (7), a claimant is not entitled to compensation under section 17 unless the claimant notifies the governmental agency of a claim of damage or physical injury, in writing, within 45 days after the date the damage or physical injury was discovered, or in the exercise of reasonable diligence should have been discovered. . . .
>
> (2) If a person who owns or occupies affected property notifies a contacting agency orally or in writing of an event before providing a notice of a claim that complies with subsection (1), the contacting agency shall provide the person with all of the following information in writing:
>
> (a) A sufficiently detailed explanation of the notice requirements of subsection (1) to allow a claimant to comply with the requirements.

(b) The name and address of the individual within the governmental agency to whom a claimant must send written notice under subsection (1).

(c) The required content of the written notice under subsection (1), which is limited to the claimant's name, address, and telephone number, the address of the affected property, the date of discovery of any property damages or physical injuries, and a brief description of the claim.

(3) A claimant's failure to comply with the notice requirements of subsection (1) does not bar the claimant from bringing a civil action under section 17 against a governmental agency notified under subsection (2) if the claimant can show both of the following:

(a) The claimant notified the contacting agency under subsection (2) during the period for giving notice under subsection (1).

(b) The claimant's failure to comply with the notice requirements of subsection (1) resulted from the contacting agency's failure to comply with subsection (2).

* * *

(7) This section does not apply to claims for noneconomic damages made under section 17.[2] [MCL 691.1419.]

The term "contacting agency" is defined to mean the "clerk of the governmental agency", "an individual who may lawfully be served with civil process directed against the governmental agency", or any "other individual, agency, authority, department, district, or office authorized by the governmental agency to receive notice under section 19 . . . ." MCL 691.1416(d).

In summary, in order to avoid governmental immunity, a claimant must show:

(1) that the claimant suffered property damage or physical injuries caused by a sewage disposal system event;

(2) that the governmental agency against which the claim is made is "an appropriate governmental agency," which is defined as "a governmental agency that, at the time of a sewage disposal system event, owned or operated, or directly or indirectly discharged into, the portion of the sewage disposal system that allegedly caused damage or physical injury";

(3) that "[t]he sewage disposal system had a defect";

(4) that "[t]he governmental agency knew, or in the exercise of reasonable diligence should have known, about the defect";

[2] Because Slicer has not sought noneconomic damages, subsection 7 is not at issue.

(5) that "[t]he governmental agency, having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect";

(6) that "[t]he defect was a substantial proximate cause of the event and the property damage or physical injury";

(7) "reasonable proof of ownership and the value of [any] damaged personal property"; and

(8) that the claimant provided notice as set forth in MCL 691.1419. [*Linton v Arenac County Rd Comm'n*, 273 Mich App 107, 113-114; 729 NW2d 883 (2006) (brackets in original; footnotes and citations omitted).]

In *McCahan v Brennan*, 492 Mich 730, 733; ___ NW2d ___ (2012), our Supreme Court reaffirmed that "statutory notice requirements must be interpreted and enforced as plainly written and that no judicially created saving construction is permitted to avoid a clear statutory mandate." Thus, "when the Legislature specifically qualifies the ability to bring a claim against the state or its subdivisions on a plaintiff's meeting certain requirements that the plaintiff fails to meet, no saving construction—such as requiring a defendant to prove actual prejudice—is allowed." *Id*. at 746.

Here, Slicer failed to allege facts or present evidence to establish that he provided the required notice to the City. MCL 691.1419. Slicer testified at his deposition that his property flooded on September 15, 2008, after a heavy rain. In his first amended complaint, he alleged: "On or about November 12, 2008 Plaintiff put the City of St. Johns on notice of the potential claim in this matter. See Exhibit 2[.]" Exhibit 2 to the complaint was a letter, dated November 12, 2008, in which Slicer's lawyer discussed the construction project and the flooding on Slicer's property following the heavy rain over the weekend of September 12 through September 15, 2008, and stating that "something must be done to prevent the flooding" and suggesting that the City or Clinton County should acquire Slicer's property to use as an overflow area. Slicer's lawyer did not, however, specifically make a claim. In any event, assuming that this letter constituted a notice, it was not provided "within 45 days after the date the damage or physical injury was discovered, or in the exercise of reasonable diligence should have been discovered." MCL 691.1419(1). Therefore, the notice was untimely.

Moreover, Slicer has not established that his failure to comply with the 45-day notice requirement was excused under MCL 691.1419(2) and (3). Slicer's complaint fails to allege any facts establishing that he notified a contacting agency orally or in writing before providing formal notice. He has thus alleged no facts triggering the contacting agency's duty to give him information regarding the notice requirements of MCL 691.1419(1). See MCL 691.1419(2). Because compliance with the notice provisions is mandatory, see *Linton*, 273 Mich App at 113-114, and because his complaint failed to allege facts establishing either that he complied with MCL 691.1419(1) or that he is excused from compliance under MCL 691.1419(2) and (3), Slicer has failed to plead facts in avoidance of immunity.

Even considering evidence outside the pleadings, Slicer has not shown that he is excused from complying with the 45-day notice requirement. The trial court's reliance on *Dybata v Wayne Co*, 287 Mich App 635; 791 NW2d 499 (2010), was misplaced because Slicer has not made the same showings as the plaintiffs there.

In *Dybata*, this Court held that the defendant county's contacting agency received informal notice of an event sufficient to trigger its obligations under MCL 691.1419(2), and, for that reason, the plaintiffs' failure to provide notice was excused. See *Dybata*, 287 Mich App at 646-647. Here, Slicer presented no evidence that "his failure to comply with the notice requirements of subsection (1) *resulted from* the contacting agency's failure to comply with subsection (2)." MCL 691.1419(3)(b) (emphasis added). At most, he presented evidence establishing that he "notified the contacting agency under subsection (2) during the period for giving notice under subsection (1)." MCL 691.1419(3)(a). At his deposition, Slicer testified that he "called the city" on September 15, 2008, and that two city employees came to his house. Later, he filed an affidavit stating that he contacted the City after the first flooding event, that he was not informed that he was required to provide a written notice to the City, and that he was not given information regarding where and how to file the notice. However, in neither his deposition testimony nor his affidavit did he state that his failure to comply with the notice requirements of MCL 691.1419(1) *resulted from* the city's failure to comply with the requirements of MCL 691.1419(2). Unlike the plaintiffs in *Dybata*, 287 Mich App at 646-647, Slicer did not state that he would have filed a timely notice of his claim if he had known of the requirement to do so or that the reason for his failure to file a timely notice was that he did not receive information concerning where and how to file the notice. Nor do any facts in the record support a reasonable inference that his failure to comply with the notice provision resulted from the City's alleged failure to give him the statutorily required information regarding where and how to file a notice.

Accordingly, because Slicer did not file a timely notice and he has not alleged or presented evidence that his failure to do so resulted from the City's failure to comply with MCL 691.1419(2), and because such a showing is required under MCL 691.1419(3) to excuse the failure to comply with MCL 691.1419(1), he "is not entitled to compensation under section 17" from the City. MCL 691.1419(1).

Next, for both the City and the Commission, Slicer failed to plead facts in avoidance of immunity in other respects.[3] Slicer's first amended complaint did not include facts establishing all the requirements of the sewage disposal system event exception, nor does it even purport to do so. Instead, the complaint alleges a claim for "negligent design." Slicer alleged that the City and the Commission negligently designed and constructed the roadway and drainage system, or, in the alternative, that they actually knew the design and construction were defective, or that they were grossly negligent. There are no allegations establishing two essential elements of a claim

[3] As discussed above, the City is entitled to summary disposition regarding the negligent design claim on the basis of Slicer's failure to provide timely notice. Nonetheless, for the sake of completeness, we will address whether the City is also entitled to summary disposition on this claim for these additional reasons.

under the sewage disposal system event exception: that, at the time of the sewage disposal system event, defendants owned or operated, or directly or indirectly discharged into, the portion of the sewage disposal system that caused damage; and that defendants, having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect. *Linton*, 273 Mich App at 113-114.

Slicer alleged negligence in the design and construction of the drainage system, but that alone is not a type of claim that falls within the sewage disposal system event exception. Although the statute defines a "defect" to include a construction or design defect, *Willett*, 271 Mich App at 49, quoting MCL 691.1416(e), a defective design or construction does not *by itself* provide a basis for imposing liability. Rather, liability is premised on the failure of the governmental agency to reasonably *repair, correct, or remedy* the defect. MCL 691.1417(3)(d). This Court has already made this point, albeit in dictum:

> We note that the statute [i.e., the sewage disposal system event exception] does not seem to "fit" the facts as alleged by plaintiffs for other reasons as well. For example, the statute imposes liability on a governmental agency only for a failure to "repair, correct, or remedy" a defect. MCL 691.1417(3)(d). The allegations here are that [the county drain commissioner] failed in his responsibilities overseeing the design and installation of the drain system. We question whether the authority [he] has under the Drain Code to oversee that process also gives rise to a duty or obligation for which [he] could be held liable. But even assuming it does, the statute providing an exception to immunity does not make [the commissioner] liable for unreasonably failing to prevent the creation of a design defect; it only imposes an obligation to reasonably "repair, correct, or remedy" an existing defect. [*Bosanic v Motz Dev, Inc*, 277 Mich App 277, 286 n 7; 745 NW2d 513 (2007).]

Similarly, here, Slicer's complaint alleges negligence in *designing or constructing* the drainage system (or, in the alternative, gross negligence or actual knowledge of the defect). That is, the complaint focuses on defendants' *creation* of the defect, rather than on any culpability for failing to repair, correct, or remedy an existing defect. As explained in *Bosanic*, the statute only imposes an obligation to reasonably repair, correct, or remedy an existing defect. Thus, the allegations in the complaint do not fall within the requirements of the statute.

Slicer also failed to allege facts to establish that either defendant is an "appropriate governmental agency" as defined by MCL 691.1416(b). There are no allegations that either the City or the Commission, "at the time of the sewage disposal system event, owned or operated, or directly or indirectly discharged into, the portion of the sewage disposal system that allegedly caused damage. . . ." MCL 691.1416(b). The complaint does list Slicer's address showing that he lives in the City, but the mere fact that his property is within the city limits does not by itself mean that the City owned or operated the drainage system, and it certainly does not suggest that the Commission did so. The complaint also alleges that the City and the Commission performed the construction work during the summer of 2008, which "included the installation of . . . three new catch basin[s], [a] culvert, re-contouring the land, and the filling of a drainage ditch that had served [Slicer's] property." Slicer also alleged that this work altered the drainage and caused flooding on his property. And, while these facts establish that the City or the Commission

operated the drainage system *when the construction was performed*, the statute defines an "appropriate governmental agency" by reference to "the time of the sewage disposal system event," MCL 691.1416(b), rather than when the alleged defect was created. The governmental agency must have owned or operated, or directly or indirectly discharged into, the defective portion of the system, "at the time of the sewage disposal system event." MCL 691.1416(b). Slicer's property flooded on September 15, 2008, *after* the construction ended. As such, Slicer failed to allege facts to establish that, *when his property was flooded*, either defendant owned, operated, or discharged into the defective portion of the system.

Likewise, he did not make any allegations establishing that either defendant, "having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect." MCL 691.1417(3)(d). Slicer also did not allege that either defendant failed to take reasonable steps in a reasonable time to repair, correct, or remedy the defect, as the complaint alleges negligence in the *creation* of the defective system rather than in the failure to repair, correct, or remedy.

For these reasons, we conclude that both the City and the Commission were entitled to summary disposition by reason of immunity granted by law. MCR 2.116(C)(7). Slicer has also not asked for leave to amend his complaint to attempt to plead in avoidance of immunity. In any event, both defendants are entitled to summary disposition on independent grounds that are not restricted to the pleadings. As already noted, the City is entitled to summary disposition on the basis of Slicer's failure to give timely notice and, as discussed below, the Commission is entitled to summary disposition on the additional ground that Slicer failed to present evidence establishing that the Commission had the legal authority to repair, correct, or remedy the alleged defects.

The portion of Townsend Road at issue in this case falls within the City's jurisdiction. The City's engineer at the time, Daniel Vreibel, acknowledged that the portion of the drainage system at issue was within the City's jurisdiction. Although the Commission designed the project and hired the contractor, Vreibel acknowledged that jurisdiction was never formally transferred to the Commission.

In the analogous context of the highway exception to governmental immunity, MCL 691.1402, this Court has held that a city may not delegate its duty or its liability. *Bivens v Grand Rapids*, 190 Mich App 455, 458; 476 NW2d 431 (1991). Also, "[t]here can be no concurrent jurisdiction over highways. Where a city has no jurisdiction over a road, the highway exception is not applicable . . . ." *Berry v City of Belleville*, 178 Mich App 541, 547; 444 NW2d 222 (1989).

The *Berry* Court distinguished *Killeen v Dep't of Transp*, 432 Mich 1; 438 NW2d 233 (1989), a case on which the City relies to argue that the Commission is responsible for the design defects. *Berry*, 178 Mich App at 547. In *Killeen*, 432 Mich at 4, jurisdiction over county roads was transferred to the state Department of Transportation to redesign and reconstruct intersections of county roads with trunk-line highways, and jurisdiction was then returned to the county road commissions when the project ended. Lawsuits were later filed regarding injuries and deaths that resulted from accidents on the redesigned roads. *Id*. Our Supreme Court held

that the Department was liable for defects created while it had jurisdiction even though jurisdiction had been transferred back to the county road commissions. *Id*. at 4-5.

In *Berry*, this Court distinguished *Killeen* because that case,

> concerned a situation where jurisdiction of a county road had been assumed by the Department of Transportation during road construction and then was relinquished back to the county. No such situation occurred in the instant case. Here, the road commission has sole and exclusive jurisdiction over the intersection and, thus, has the statutorily imposed duty and liability. [*Berry*, 178 Mich App at 547.]

Thus, even though a municipality had allegedly created a defect during a construction project, it did not owe a duty to the plaintiffs. *Id*. at 543-547;[4] see also *Bennett v Lansing*, 52 Mich App 289; 217 NW2d 54 (1974).

Although *Berry* is not controlling, MCR 7.215(J)(1), we find *Berry* persuasive. Here, the City had jurisdiction over the defective portion of the drainage system at all relevant times. Hence there is no basis to conclude that the Commission had the legal authority to repair, correct, or remedy the purported defects. Nor is there any basis to conclude that the City could, or did, delegate to the Commission its legal authority to repair, correct, or remedy any defects in the portion of the drainage system under the City's jurisdiction. Cf. *Bivens*, 190 Mich App at 458; *Bennett*, 52 Mich App at 295-296.

It is true that the Commission's engineer, Daniel Armentrout, testified about his efforts to remedy the problem after Slicer's property flooded. Armentrout also testified, however, that he disagreed with the City's decision to plug a culvert, but that the road fell within the City's jurisdiction and the decision therefore fell within the City's discretion. Moreover, although the City adopted the Commission's suggestion of placing a flapper gate on a pipe, it was the City manager's decision to follow that recommendation. In short, although Armentrout participated in trying to fix the problem, it was ultimately the City's determination how to proceed. Slicer has thus failed to present facts establishing that the Commission had the legal authority to repair, correct, or remedy the alleged defects. Cf. *Jackson Co Drain Comm'r v Village of Stockbridge*, 270 Mich App 273, 288; 717 NW2d 391 (2006), implicitly overruled on other grounds by *Lash v Traverse City*, 479 Mich 180; 735 NW2d 628 (2007).

The City relies heavily on the fact that Armentrout designed the project. As discussed above, however, the sewage disposal system event exception does not impose liability for design defects *per se*. Instead, liability is premised on the failure to reasonably repair, correct, or remedy an existing defect by the governmental agency having the legal authority to do so. MCL

[4] Also, the portion of *Killeen* suggesting that the highway exception creates a duty to correct design or construction defects was subsequently rejected as unpersuasive dictum in *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 501 n 7; 638 NW2d 396 (2002).

691.1417(3)(d); *Bosanic*, 277 Mich App at 286 n 7. Accordingly, the fact that the Commission designed the project is not dispositive.

In addition to Slicer's failure to establish the Commission's authority to repair, correct, or remedy the alleged defects, there is also no evidence in support of the additional requirement that the Commission be an "appropriate governmental agency" under MCL 691.1416(b). There is no evidence that the Commission owned or operated the defective portion of the drainage system at the time of the sewage disposal system event. The Commission has conceded on cross-appeal that it *does* discharge water into some portion of the system: "While not particularly reflected in the record, it is apparent that water from both the City and the County 'owned' portions of the project flows to the detention basin; there is no way to know whether the water Plaintiff alleges damaged his property came from any particular part of the system, or just came from the sky or Plaintiff's own property, as all claimed events occurred during rain events." In any event, because the Commission was entitled to summary disposition on the separate ground of its lack of authority to repair, it is not necessary to determine whether the Commission is an "appropriate governmental agency."

The City and the Commission next argue that the trial court erred in denying their motions for summary disposition regarding Slicer's inverse condemnation claim. Because the trial court considered facts outside the pleadings in deciding this issue, we shall examine this issue under MCR 2.116(C)(10). See *Mitchell Corp v Dep't of Consumer and Industry Servs*, 263 Mich App 270, 275; 687 NW2d 875 (2004). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). In addition, this Court "review[s] de novo constitutional issues and any other questions of law that are raised on appeal." *Cummins v Robinson Twp*, 283 Mich App 677, 690; 770 NW2d 421 (2009).

"Both the United States and Michigan constitutions prohibit the taking of private property for public use without just compensation." *Wiggins v City of Burton*, 291 Mich App 532, 571; 805 NW2d 517 (2011).[5] "The government normally 'takes' private property through the power of eminent domain and formal condemnation proceedings." *Cummins*, 283 Mich App at 706. However,

> Michigan recognizes a cause of action, often referred to as an inverse or reverse condemnation suit, for a de facto taking when the state fails to utilize the appropriate legal mechanisms to condemn property for public use. A de facto taking can occur without a physical taking of the property; a diminution in the

[5] Governmental immunity is not available where the plaintiff has alleged that the state has violated a right conferred by the Michigan Constitution. *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 546-547; 688 NW2d 550 (2004).

> value of the property or a partial destruction can constitute a taking. No exact formula exists to determine when a de facto taking occurs, but there must be some action by the government expressly directed toward the plaintiff's property that effectively limits the use of the property. [*Id*. at 708 (internal quotation marks and citations omitted).]

The plaintiff must also prove that the government's actions were a substantial cause of the decline in value of the property. *Id*. "In determining whether a taking occurred, the form, intensity, and deliberateness of the governmental actions toward the injured party's property must be examined." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 295; 769 NW2d 234 (2009). All actions taken by the governmental agency must be analyzed in the aggregate. *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 132; 680 NW2d 485 (2004).

Our Supreme Court has recognized that a taking may occur "where real estate is actually invaded by superinduced water, earth, sand or other material. . . ." *Peterman v Dep't of Natural Resources*, 446 Mich 177, 189 n 16; 521 NW2d 499 (1994) (internal quotation marks and citation omitted); see also *Wiggins*, 291 Mich App at 572. In *Peterman*, 446 Mich at 181, the Michigan Department of Natural Resources installed jetties around a boat-launch ramp in a bay, causing the erosion of the plaintiffs' nearby beachfront property. The plaintiffs alleged that the defendant's actions constituted an unconstitutional taking of their property. *Id*. at 184. The defendant argued that no taking occurred because the erosion of the beachfront was an indirect consequence of the defendant's actions. *Id*. at 188. This Court upheld the trial court's finding that the defendant's actions were the proximate cause of the destruction of the plaintiffs' beachfront property, noting that the defendant had set into motion the forces that caused the erosion and that the defendant had been warned that the construction of the jetties could result in the washing away of the plaintiffs' property. *Id*. at 191.

In *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 539; 688 NW2d 550 (2004), the state acquired a house following a tax sale, and a fire led to the house being deemed a "dangerous building." A second fire then occurred at the house, damaging the plaintiffs' neighboring homes. *Id*. This Court upheld the trial court's ruling that the plaintiffs had not established a de facto taking because they did not allege any overt action by the state directed at the plaintiffs' properties. *Id*. at 550. In reaching this decision, the *Hinojosa* Court looked to the reasoning in *Attorney General v Ankersen*, 148 Mich App 524; 385 NW2d 658 (1986):

> We find this Court's decision in *Ankersen* instructive in applying these principles [regarding an inverse condemnation claim] to the case at bar. In *Ankersen*, the Attorney General sought to abate a nuisance: the improper storage of hazardous chemicals that created a fire hazard. The "innocent" landowners brought a counterclaim against the Director of the Department of Natural Resources and the Natural Resources Commission, alleging that the "counterdefendants participated in the creation of a nuisance and that their actions amounted to an uncompensated taking." *Ankersen*, *supra* at 532, 558. The Court stated the two elements of an inverse condemnation claim are "(1) 'that the government's actions were a *substantial* cause of the decline of his property's value,' and (2) 'that the government abused its legitimate powers in affirmative

> actions directly aimed at the plaintiff's property.'" *Ankersen*, *supra* at 561, quoting [*Heinrich v Detroit*, 90 Mich App 692, 700; 282 NW2d 448 (1979)]. First, the *Ankersen* Court concluded that the state's action of licensing a person or corporation to conduct a private business "cannot be regarded as a taking of private property by the government for public use." *Ankersen*, *supra* at 561. The Court continued, "[s]econdly, the state's alleged misfeasance in licensing and supervising the operation does not constitute 'affirmative actions directly aimed at the property'. Thus, . . . the inaction and omissions by the state cannot be found to constitute a 'taking'." *Id*. at 562. [*Hinojosa*, 263 Mich App at 549-550.]

Likewise, in *Hinojosa*, because the "plaintiffs failed to allege that the state took affirmative action directed at [the] plaintiffs' properties, which was a substantial cause of the decline of their property's value, [the] plaintiffs failed to state a claim on which relief can be granted." *Id*. at 550 (internal quotation marks and citation omitted).

In *Marilyn Froling Revocable Living Trust*, 283 Mich App at 296, this Court found no evidence of affirmative acts by the defendant city directly aimed at the plaintiff's property where the defendant refused to construct a drainage system to cure water problems affecting the plaintiff's property. In *Wiggins*, 291 Mich App at 537-538, 572, however, this Court held that the defendant city's construction and installation of drainage pipes to carry storm water from property owned by the plaintiffs' neighbors to the plaintiffs' property was an affirmative act by the defendant directly aimed at the plaintiffs' property, but remanded to the trial court to determine whether the defendant's actions were a substantial cause of the decline of the value of the plaintiffs' property. But the *Wiggins* Court further held that any material increase in the flow of water through the drain could not have constituted a taking because ownership of the drain and the drainage system was transferred to private parties immediately upon the completion of the construction project. *Id*. at 572-573. "Thus, while the City may well be liable in inverse condemnation for its construction and installation of the physical drain itself, the City can have no inverse-condemnation liability arising out of the flow of water through the privately owned drain." *Id*. at 573.

Here, Slicer alleged facts establishing that the City and the Commission took affirmative acts directly aimed at his property. He did not merely allege a negligent omission, as in *Hinojosa*, and is not asserting that defendants refused to take an action, such as to construct a drainage system, as in *Marilyn Froling Revocable Living Trust*. Rather, as in *Wiggins*, Slicer alleged and presented facts establishing that the City and the Commission created a system that deliberately discharges water onto his property. He alleged that defendants performed construction work, including installing new catch basins and a culvert, re-contouring the land, and filling a drainage ditch that had served his property. This reconfiguration of the drainage system, Slicer alleged, caused his property to flood regularly and essentially amounted to the City and the Commission using his property as an overflow detention area. Slicer further alleged that the reconfigured drainage system and repeated flooding has rendered his property unusable and deprived it of value.

There are also facts in evidence to support the allegations. Slicer testified that he has lived in his home since 1967, and, although he experienced a few floods in the 1970s and 1980s, his property had not flooded for approximately 20 years before the floods that followed defendants' 2008 construction project. In 2008, the City and the Commission cooperated to widen Townsend Road in the area of Slicer's home. Because the project added a turn lane and a sidewalk, the ditches were removed and replaced by a curb and gutter system. Thus, water would no longer run off the road into ditches, but would instead go down the curb line into catch basins and then into a storm water sewer system. Although the Commission requested federal funds for the project through the Michigan Department of Transportation, the City engineer initiated the project by approaching the Commission about adding a turn lane and sidewalks. The City's engineer also e-mailed the Department of Transportation to express its support for the project. There was no formal agreement or resolution transferring jurisdiction of the City's portion of the road to the Commission.

The Commission performed the primary design work for the project, subject to input by the City regarding the portion of the project under its jurisdiction. According to Armentrout, the Commission reviewed the plans with the City throughout the design process and needed the City's approval for the plans. Armentrout indicated that the City's engineer, Vreibel, came to a preconstruction, grade inspection meeting to bid out the project, and stated that he showed Vreibel a full set of plans before the meeting, which was before Vreibel wrote his e-mail supporting the project. Vreibel testified, however, that the City received only a partial set of plans at the design stage and never received a complete set of plans. Vreibel testified that he did not review the plans in terms of road drainage. Armentrout acknowledged that he placed his seal on the design documents, showing that he was responsible for the design of the project. According to Armentrout, it was Vreibel who recommended using a curb and gutter cross-section, which led to eliminating the ditches. Vreibel did not recall whether he suggested this but opined that it was logical to eliminate ditches when adding a third lane, because otherwise the ditches could fall outside the right of way.

After the project ended, Slicer's property repeatedly flooded, with water entering his house on three occasions. He claims to have suffered $64,000 in losses, based on an appraisal of his house. After the second flooding event, the City plugged a culvert, which Armentrout opined was not a good idea because it failed to provide an outlet for Slicer's neighbor's sump pump. However, the road was within the City's jurisdiction and the decision thus fell within the City's discretion. Armentrout explained that Slicer's neighbor's sump pump was keeping the tile full and that the water could not flow out because the City had plugged the culvert. Vreibel testified that the pipes crossing Townsend Road, which were installed as part of the project, are only six inches higher than the bottom of the detention basin, so when the detention basin begins to fill up, water could travel from the detention basin back up the pipe. Vreibel would not have installed the pipe at issue that crosses Townsend Road because it was not needed given the other nearby pipes and catch basins. Vreibel opined that water was backing up at the entrance to the detention basin and then finding a course of least resistance back across the road to Slicer's property.

This evidence supports the conclusion that both the City and the Commission created a storm water system that discharges water onto Slicer's property. The City and the Commission cooperated as partners in the construction project that led to the removal of the ditches that served Slicer's property, which had not previously flooded for approximately 20 years. Vreibel's testimony suggests that the pipe inserted by the Commission was causing flooding because it was too low relative to the detention basin, whereas Armentrout's testimony indicates that the City's decision to plug a culvert was failing to provide an outlet for Slicer's neighbor's sump pump. Therefore, there are issues of fact regarding whether either or both defendants committed affirmative actions directly aimed at Slicer's property that were a substantial cause of the repeated flooding of his property.

The Commission suggests that it cannot be held liable under an inverse condemnation theory because the City has jurisdiction over the portion of the road and the drainage system adjacent to Slicer's property, and it lacks authority under MCL 213.171(i) to take property within a city in the absence of a resolution from the city consenting to a transfer of jurisdiction. The Commission has cited no authority establishing that this provision applies in the context of an inverse condemnation or de facto taking claim. Therefore, we consider this argument abandoned on appeal. *Blackburne & Brown Mortgage Co v Ziomek*, 264 Mich App 615, 619; 692 NW2d 388 (2004). In any event, the language of MCL 213.171(i) plainly refers to formal condemnation proceedings. Moreover, although the City has jurisdiction over the relevant parts of the road and drainage system, the Commission played a central role in the construction project and committed affirmative acts in designing and overseeing the project that, according to Slicer's theory, substantially caused the flooding that damaged his property. And, as discussed above, the Commission concedes that water from county-owned portions of the drainage system enter into the detention basin involved in this case. Unlike *Wiggins*, 291 Mich App at 572-573, this case does not involve a drainage system that was transferred to private parties after it was constructed. Water discharged from both the county and the city-owned portions of the project appears to be involved in the flooding. Accordingly, we conclude that a genuine issue of material fact exists regarding Slicer's inverse condemnation claim.

The trial court erred when it denied the City's and the Commission's motions for summary disposition of Slicer's sewage disposal event claim, but did not err when it denied their motions with regard to Slicer's inverse condemnation claim.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. None of the parties having prevailed in full, none may tax their costs. MCR 7.219(A).

/s/ Jane M. Beckering
/s/ Michael J. Kelly

STATE OF MICHIGAN

COURT OF APPEALS

THEODORE SLICER,

Plaintiff-Appellee/Cross-Appellee,

v

CITY OF ST. JOHNS,

Defendant/Cross-Plaintiff-Appellant/Cross-Appellee,

and

COUNTY OF CLINTON,

Defendant,

and

CLINTON COUNTY ROAD COMMISSION,

Defendant/Cross-Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
December 6, 2012

No. 298068
Clinton Circuit Court
LC No. 09-010506-CK

Before: TALBOT, P.J., and BECERKING and M. J. KELLY, JJ.

TALBOT, J. (*concurring*).

I concur with the majority but write separately to note the following. The record demonstrates that Theodore Slicer was not well served by his attorney. In addition to the problems with the pleadings discussed by the majority, the most glaring issue was counsel's failure to establish, either by inquiry at Slicer's deposition or in an affidavit, the requisite facts to support that he was excused from complying with the notice requirement of the sewage disposal

system event exception to governmental immunity.[1] Although it is rather obvious that Slicer's failure to give timely notice of his claim resulted from the City's failure to provide him with an explanation of the notice requirements in compliance with the relevant statute,[2] such was not demonstrated by the evidence, and thus the notice exemption cannot apply. Slicer, however, continues to have remedies that he may pursue.

/s/ Michael J. Talbot

[1] MCL 691.1419(3).

[2] MCL 691.1419(2).