Wiggins v City of Burton:

The Court of Appeals Successfully Transforms Water Into Sticks, But Misses the Mark on Inverse Condemnation

by Ronald E. Reynolds and Christopher S. Frescoln***

On February 8, 2011, the Michigan Court of Appeals rendered a comprehensive property rights decision in a dispute between adjacent neighbors and their city in *Wiggins v City of Burton*.[1] The substance of the case can be summarized succinctly: One neighbor (or two, in this case) may not change the natural flow of surface water and divert it onto another neighbor's property, by physically installing a pipe on the other neighbor's property, without permission, and with the force of government (especially if the action renders the kids' play area useless). Yet there is much more complexity to *Wiggins*. The decision contains a rich discussion and application of property rights law, including rights relating to express easements, trespass, nuisance, surface water flow, governmental immunity, and takings law. In an otherwise well-reasoned decision, however, the Court unfortunately limited the City's liability for inverse condemnation in a manner inconsistent with controlling Michigan law.

The Mahlers, the Heckmans, and the Wigginses

Sometime in the 1990s, Maplewood Meadows No. 1 subdivision was laid out and platted in the City of Burton. The Mahlers and the Heckmans already lived on parcels outside of the Maplewood Meadows plat, but adjacent to the lot in the subdivision purchased by the Wigginses in 2003. The Mahlers and Heckmans asserted that the construction of the subdivision caused surface water drainage problems on their property and lodged several complaints to the City over the years. The lot purchased by the Wigginses within the subdivision was encumbered by an express "private easement for storm detention" contained on the plat.

Mr. Heckman ultimately convinced the City Council in 2007 to construct a relief drain project for his property. The City hired a local contractor who designed a plan to install individual drains on the Mahler and Heckman properties and to connect these drains to the private easement storm detention area identified on the plat within the Wigginses' backyard via a 180-ft. drainage pipe. In order to complete this project, the City's contractor entered the Wigginses' property, trenched, and laid the drainage pipe, all without permission from the Wigginses. The open end of the drainage pipe spilled directly into the children's swing set area, which the Wigginses argued rendered their small backyard virtually unusable.

The Mahlers and Heckmans signed paperwork acknowledging that, upon completion, the drainage project

1 291 Mich App 532; 805 NW2d 517 (2011).

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would belong solely to them and that they would be responsible for its maintenance and repair into the future. The Court noted that the "practical effect of this drainage project was to carry the accumulated surface waters away from the Heckman and Mahler parcels and to deposit those waters in the Wiggins' backyard."[2]

The Litigation

The Wigginses, naturally, sued the City and their neighbors on claims of quiet title, trespass, and nuisance. They also brought trespass, nuisance, and inverse condemnation claims against the City. The Wigginses asked for money damages and injunctive and declaratory relief.

The City filed a motion to dismiss the case, raising a number of arguments, including that the claims against it were barred by governmental immunity and that the drainage project was within the scope of, and authorized by, the private easement for storm detention. The Mahlers and Heckmans also filed motions for summary disposition. The defendants all argued that the natural flow of surface water had always run to the Wigginses property even before the subdivision was platted, and the City submitted a topographical contour map in support of this argument.

The Wigginses countered the motions to dismiss. The Wigginses agreed that their property was encumbered by the private easement for storm detention and that surface water in the area naturally flowed toward their property. They argued, however, that the drain project was not within the scope of the easement and that it altered the natural flow of surface water by increasing and concentrating the flow onto their property via the drainage pipe. They argued that the scope of the private easement was limited to "the accommodation of surface water matriculating to the detention basin by only natural means and courses."[3]

According to the Court of Appeals' discussion of the record, the trial court judge seemed to grasp the distinction made by the Wigginses at the motion hearing:

> The court agreed that "[t]here is a natural flow that's suggested in that topographical map, but noted that the Wiggins parcel "accepted that natural flow and everything was appropriate and understood until suddenly a pipe was put in. Now, if the flow increases two or three years after [the Wiggins] move onto the property, that suggests that it's not the natural flow."[4]

However, the trial court, based on its own independent research, determined that the Michigan Drain Code controlled the outcome of the litigation. Specifically, the trial court ruled that the procedures set forth for condemning lands for drain projects contained in MCL 280.75 should have been followed by the City. The trial court dismissed the claims against the City without prejudice to allow the City and the Wigginses to follow the procedures in MCL 280.75. The trial court dismissed the case as to the Mahlers and Heckmans, contending that they did not directly trespass onto the Wigginses' property, nor could their request for relief from the City give rise to trespass or nuisance.

The Wigginses filed an appeal and the City cross-appealed. In a decision containing a detailed and substantial analysis of property rights, the Court of Appeals rendered a comprehensive decision affirming the trial court in part, reversing in part, and remanding for further proceedings.

The Court of Appeals outright rejected the trial court's ruling under the Michigan Drain Code. The Court found that none of the statutory prerequisites contained in the Code were realized and therefore the procedures were not relevant to this case. The Court also ruled in favor of the Wigginses on the trespass claims against the Mahlers and the Heckmans and remanded to determine the appropriate remedies. The Court further reiterated the standards governing rights in the natural flow of surface water and remanded for further proceedings on that issue. Finally, with respect to the claims against the City, the Court remanded the issues of inverse condemnation and governmental immunity for further proceedings.

The Express Easement

A pivotal issue in the case was whether the private easement for storm detention expressed on the plat and encumbering the Wigginses' property gave authority for

2 *Id* at 538.

3 *Id* at 544.

4 *Id* at 546-47.

the drain project. After reciting and discussing the rules governing easement interpretation, the Court concluded that the easement did not authorize the placement of the drainage pipe. The Court ruled that although the easement was not contained in a separate recorded document but rather was noted on the subdivision plat, it has the force and effect of an express easement grant.[5] According to the plain language of the text, the easement was limited to "storm detention" and the text did not include any language relating to the installation of pipes or drains. As such, the Court concluded "that it is beyond factual dispute that the physical drain and drainpipes at issue in this case exceeded the scope of the 'private easement for storm detention' as delimited by the plain language of the easement, itself."[6]

A puzzling aspect of the case, which is not addressed by the Court of Appeals, is why the City felt empowered to take action under an easement that is plainly and unambiguously delimited as a "private" easement. "Private" should mean "*not public*," and a public body should probably not be taking any action under an easement designated "private." Whether the neighbors had rights under this private easement, of course, is a different issue. But assuming *arguendo* that they did, it does not follow that public action by the City of Burton on private property was appropriate.

Contrast this case with the decision in *Blackhawk Dev Corp v Village of Dexter*,[7] where the Michigan Supreme Court ruled that the express language contained in a public highway easement over Blackhawk's property granted to the Village did not authorize the placement of improvements benefitting a neighboring private property owner. Had the express easement authorized the improvements, the Village, as grantee under the *public* easement, certainly would have been within its rights to act under the easement. In this case, the City of Burton was not a grantee or a beneficiary under the easement, which was expressly delimited *private*.

Nevertheless, the City of Burton took public action on private property. The City's action should send shivers down the backs of advocates of property rights. The City should have been sternly rebuked for its action as a reminder to municipalities that they have no role in arbitrating among private property interests.[8] Simply stated, a private easement encumbering private property in favor of other private property owners does not give rise to public action.

The Trespass and Nuisance Claims: The Right to Exclude v the Right to Enjoy

The Court of Appeals' decision in *Wiggins* provides an excellent discussion and analysis of the distinction between the torts of trespass and nuisance. The Court begins by analyzing the distinct property rights that are at the core of each tort: the right to exclude and the right to enjoy. The Court stated:

> The right to exclude others from one's property and the right to enjoy one's property are two distinct possessory interests, "violations of which give rise to two distinct causes of action respectively of trespass and nuisance."[9]

The right to exclude and the right to enjoy are two important "sticks" within the "bundle of sticks" that comprise property rights.[10]

The Michigan Supreme Court referred to the right to exclude nearly a century and a half ago as "the most beneficial, the one most real and practicable idea of property …."[11] The *Wiggins* Court noted that breach of that right to exclude establishes liability for trespass:

> Thus, in Michigan, "[r]ecovery for trespass to land

5 *Id* at 552.

6 *Id* at 554.

7 473 Mich 33; 700 NW2d 364 (2005) (referenced in *Wiggins* Standard of Review).

8 Indeed, the Michigan Supreme Court has made clear that public action benefiting one private property owner over another cannot be tolerated, even when it is sanctioned by statute. *See Tolksdorf v Griffith,* 464 Mich 1, 10 (2001) ("We note that the act does not impose a limitation on land use that benefits the community as a whole. Instead, it gives one party an interest in land the party could not otherwise obtain.").

9 *Wiggins*, 291 Mich App at 554-55 (quoting *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 58-59; 602 NW2d 215 (1999)).

10 The United States Supreme Court credits Benjamin Cardozo with coining the phrase "bundle of sticks" to refer to property rights. *See United States v Craft*, 535 US 274, 278 (2002) ("A common idiom describes property as a "bundle of sticks" -- a collection of individual rights which, in certain combinations, constitute property. *See* B. Cardozo, Paradoxes of Legal Science 129 (1928) (reprint 2000).").

11 *Grand Rapids Booming Co v Jarvis*, 30 Mich 308, 320-21 (1874).

> . . . is available only upon proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession. Once such an intrusion is proved, the tort has been established, and the plaintiff is presumptively entitled to at least nominal damages."[12]

The Court found that the installation of the drain was "unquestionably" an unauthorized direct, physical intrusion onto the Wigginses' parcel.[13] The Court rejected the argument adopted by the trial court that the Mahlers and Heckmans could not be liable for trespass since they themselves did not perform the drain work. Instead, the Court applied a broad test for trespass liability, holding that the Mahlers' and Heckmans' request to the City for relief, and their authorization of the City's action, as well as their ownership of the drain, gave rise to liability on their part.[14]

The Court reversed the trial court ruling with respect to the Mahlers and Heckmans and remanded for entry of judgment in the Wigginses' favor on the trespass claim. The Court also ordered the trial court to enter an injunction enjoining the Mahlers' and Heckmans' use of the drain and requiring them to remove any part of the drain encroaching on the Wigginses' property. The Court noted that, in addition to nominal damages, a property owner could seek recovery for any actual damages caused by the trespass. The Court ordered the trial court to conduct further proceedings on the issue of actual damages.

With respect to the nuisance claim, the Court upheld the trial court's decision dismissing any claim against the Mahlers and Heckmans. The Court based its ruling on the distinction between the rights impacted by trespass and nuisance:

> In contrast, "[w]here the possessor of land is menaced by noise, vibrations, or ambient dust, smoke, soot, or fumes, the possessory interest implicated is that of use and enjoyment, not exclusion, and the vehicle through which a plaintiff normally should seek a remedy is the doctrine of nuisance." Unlike in the case of trespass, "[t]o prevail in nuisance, a possessor of land must prove *significant harm* resulting from the defendant's *unreasonable interference* with the use or enjoyment of the property."[15]

The Court opined that, since the installation of the drain constituted a"tangible object," it implicated an actionable claim of trespass, and not nuisance.[16]

Surface Water Flowage Rights: A Distinct Trespass Claim

The *Wiggins* Court also addressed whether the Mahlers and the Heckmans could be liable in trespass based upon the surface water natural flow doctrine. Michigan common law governs the rights of adjacent property owners with respect to the flow of surface water both on and off their property.[17] In *Wiggins*, both sides argued that the flow of surface water had been modified from its natural state. The City, Mahlers, and Heckmans maintained that the development of the subdivision altered the natural flow from the Mahlers' and Heckmans' property, which allegedly flowed into the area now consisting of the Wigginses' property. The City provided a topographical contour map in support of its argument. The Wigginses argued that although they agreed that the natural flow of surface water was to their property, the installation of the drain system altered that flow and flooded their back yard, which would not have occurred with the natural flow.

The Court of Appeals determined that the evidence was inconclusive on the issue of the natural flow and remanded for further proceedings on the issue. In doing

12 *Wiggins*, 291 Mich App at 555 (citation omitted).

13 *Id* at 556.

14 *Id* at 557-58 ("It is a well established principle of law that all persons who instigate, command, encourage, advise, ratify, or condone the commission of a trespass are co-trespassers and are jointly and severally liable as joint tortfeasors.") (quoting *Kratze v Independent Order of Oddfellows*, 190 Mich App 38, 43; 475 NW2d 405 (1991) rev'd in part on other grounds 442 Mich 136 (1993)).

15 *Id* at 555-56 (emphasis in the original) (citation omitted).

16 The Court remanded for a decision as to whether the City could be liable for trespass in light of the doctrine of governmental immunity because the trial court had not addressed the issue below. *Id* at 573-74.

17 For a more detailed discussion of the natural flow doctrine, see Reynolds, *Go With the Flow: Common Law Standards Governing Surface Runoff Among Neighboring Properties*, 35 Mich Real Prop Rev180 (Winter 2008).

so, however, the Court provided a great primer on the law governing the surface water natural flow doctrine:

It has been "the settled law of this state" for more than a century that the natural flow of surface waters from the upper, dominant estate forms a "natural servitude" that encumbers the lower, servient estate. The owner of the lower, servient estate must bear this natural servitude, and is bound by law to accept the natural flow of surface waters from the upper, dominant estates. It is similarly well settled, however, that "the owner of the upper estate has no right to increase the amount of water that would otherwise naturally flow onto the lower estate." For instance it has been said that the owner of the upper estate "cannot, by artificial drains or ditches, collect the waters of . . . his premises, and cast them in a body upon the proprietor below him to his injury." Nor may the owner of the upper estate "concentrate [the surface] water, and pour it through an artificial ditch or drain, in unusual quantities and greater velocity, upon an adjacent proprietor." Stated another way, "the owner of the dominant estate may not, by changing conditions on his land, put a greater burden on the servient estate by increasing and concentrating the volume and velocity of the surface water."[18]

The Court found that the express easement merely required that the Wigginses' property retain those waters that naturally flow to it as result of "storms," or precipitation. Thus, the express easement did not expand upon the implied natural servitude created by the natural flow doctrine. However, the Court found that an issue of material fact remained as to whether the natural flow of surface water to the Wigginses' property has been "*materially increased* beyond that which historically and naturally flowed to it from the dominant estates" as a result of the activities on the adjacent properties.[19] If answered in the affirmative, then this would amount to a trespass distinct from the trespass caused by the physical invasion of the drain system itself, as well as give rise to distinct rights to legal, injunctive, and declaratory remedies.

The Scope of the City's Right to Governmental Immunity

Because the trial court dismissed the Wigginses' claims against the City on the basis of MCL 280.75, it did not address the City's entitlement to governmental immunity for the Wigginses' tort claims.[20] The City challenged the trial court's failure to make a determination on governmental immunity in its cross-appeal. The Court of Appeals determined that because the issue was not addressed by the trial court, it was not preserved for appellate review and it declined to address the issue for the first time on appeal. The Court instead remanded the tort claims against the City for further proceedings, with the following instructions:

> On remand, the circuit court will be required to consider whether the City is entitled to governmental immunity with respect to the Wiggins' tort claims. Specifically, the circuit court will be required to decide whether governmental immunity insulates the City only from the Wiggins' claims for money damages, or whether governmental immunity bars *all* of the Wiggins' tort claims against the City, including those seeking only injunctive, declaratory, or other equitable relief.[21]

At the time of filing their appeal, the Wigginses had conceded that the City was immune from tort liability for money damages. The Wigginses, however, maintained their trespass claims against the City for injunctive, declaratory, or other equitable relief. Given the Court of Appeal's finding of tort liability against the Mahlers and Heckmans and its order for entry of injunctive relief against them, the issue of the City's liability for injunctive relief became effectively moot for the Wigginses on remand. Their primary objective in filing suit was to obtain injunctive relief requiring the removal of the drain from their property. The Wigginses were indifferent to the identity of the tortfeasor(s) who would ultimately be ordered to remove the drain. While they ultimately obtained the injunctive relief they prayed for, the absolute immunity claimed by the City from all tort remedies gives rise to a troubling "what-if" scenario that the Court of Appeals recognized in the foregoing quotation.

The key to the Wigginses' entitlement to injunctive relief was a provision in the permits executed by the Heckmans and Mahlers prior to construction that stated: "The project, when completed, will belong solely to the properties and will be the property owners [sic] responsibil-

18 *Wiggins*, 291 Mich App at 563-64 (citations omitted).

19 *Id* at 566 (emphasis in the original).

20 *Id* at 573.

21 *Id* at 574 (citations omitted)

ity to maintain/repair."[22] The Court noted that the trial court had "wholly disregarded the fact that the drain, once constructed and installed, belonged to the Heckmans and Mahlers rather than the City."[23] The trial court had erroneously ruled that "merely requesting relief from a city is not sufficient to rise to the level of a trespass."[24] If the transfer of ownership provision was not included in the permits for the project, then the trial court would have made a very good point. The Wigginses would have had a difficult task establishing a trespass against the Heckmans and Mahlers for merely requesting relief from the City.

Had the drain remained under the ownership and control of the City following its installation, then it is possible the Wigginses' only colorable cause of action would have been against the City. The Court of Appeals determined that both the construction of the drain and the continuing presence of the drain on the Wigginses' property constituted a trespass and a continuing trespass, respectively, against the Wigginses.[25] If the City had been the sole wrongful actor responsible for the trespasses, then its entitlement to governmental immunity could have made it impossible for the Wigginses to obtain the critical injunctive relief they primarily sought under the interpretation of the governmental immunity statute advanced by the Court of Appeals in *Jackson Co Drain Comm'r v Stockbridge*.[26] Under this hypothetical scenario, the Wigginses may have been relegated to pursuing their claims for inverse condemnation against the City alone. If the reasoning in *Jackson Co Drain Comm'r* is correct, then the Wigginses could have been left with no legal means for obtaining injunctive relief against any party. A money award for a partial inverse condemnation against the City under these circumstances, while the drain remained in place, discharging their neighbors' surface water into their backyard, would have been no consolation to the Wigginses.

The Court of Appeals suggested in *Wiggins* that under *Jackson Co Drain Comm'r*, a government entity may enjoy total immunity against all tort claims not otherwise excepted under the Governmental Tort Liability Act,[27] whether the relief sought is for money damages or purely for injunctive relief. The *Wiggins* Court, however, also implied that an argument could be made to the contrary under the plurality (and non-binding) decision in *Hadfield v Hoakland Co Drain Comm'r* and the majority decision in *Lash v Traverse City*.[28]

The reasoning in the Michigan Supreme Court decision in *Lash*, however, appears to give direction as to whether the ruling in *Jackson Co Drain Comm'r* is correctly decided. The plaintiff in *Lash* sought to bring a private cause of action seeking monetary damages only under the Michigan statute governing residency for public employees. The Court agreed that the city violated the residency statute with respect to the plaintiff, but ruled that the statute did not provide for a private cause of action, nor was such an action a recognized exception to the governmental immunity statute. The Court also disagreed with the plaintiff's argument that a private cause of action was the only remedy to the city's conduct, and made clear that equitable remedies were available to remedy a violation of the statute:

> Moreover, plaintiff's claim that a private cause of action for monetary damages is the only mechanism by which the statute can be enforced is incorrect. Defendant could enforce the statute by seeking injunctive relief pursuant to MCR 3.310, or declaratory relief pursuant to MCR 2.605(A)(1). A preliminary injunction may be granted under MCR 3.310(A) where plaintiff can make a particularized showing of irreparable harm that will occur before the merits of the claim are considered. Moreover, an "actual controversy" exists for the purposes of a declaratory judgment where a plaintiff pleads and proves facts demonstrating an adverse interest necessitating a judgment to preserve the plaintiff's legal rights. In this case, plaintiff's claim is that defendant's residency requirement, made a condition of plaintiff's employment, was in violation of [the statute]. Such a claim would constitute an "actual controversy" for the purposes of an action for a declaratory judgment.[29]

22 *Id* at 537.

23 *Id* at 558.

24 *Id* at 557.

25 *Id* at 551.

26 270 Mich App 273, 284; 717 NW2d 391 (2006) (holding that "[t]he plain language of the [governmental immunity] statute does not limit the immunity from tort liability to liability for [money] damages").

27 MCL 691.1401 *et seq*.

28 479 Mich 180; 735 NW2d 628 (2007).

29 479 Mich at 196-97 (citations omitted).

Lash, which was decided by the Michigan Supreme Court after the Court of Appeals decision in *Jackson Co Drain Comm'r* but does not refer to it, strongly suggests that the governmental immunity statute does not eliminate equitable remedies for unlawful conduct by government actors. To rule otherwise would be an affront to individual property rights. With no such equitable remedies available against municipalities, individual property owners would be at greater risk of having their property taken by an otherwise unlawful government trespass. For those property owners, like the Wigginess, who regard their homes and their land as unique, a money award for an inverse condemnation would constitute a terribly inadequate remedy for a government trespass.

The Inverse Condemnation Claim Against the City

The Court of Appeals decision in *Wiggins* generally provides a comprehensive analysis of a real property dispute in a manner that honors the fundamental tenets of property rights. Yet the decision falls short with respect to the disposition of the inverse condemnation claim. As a starting point, it should go without saying that red lights should automatically go off when the government enters private property without permission of its owners and it is not the local sheriff apprehending a fleeing suspect or a fireman with a hose.[30] In this case, the City of Burton chose sides between neighbors, and then physically entered the property of the losing side and altered their property without permission. The trial court seemed unfazed by this act and dismissed the inverse condemnation claim.

The Court of Appeals, to its credit, reversed the trial court on the inverse condemnation claim. The Court found that the City's action amounted to a taking, but restricted the period of compensation because the City "transferred" the drain system ownership to the Mahlers and Heckmans upon completion. Unfortunately, the Court of Appeals' detailed analysis on the trespass and natural flow issues is lacking with respect to the inverse condemnation claim and the Court altogether misses controlling law on this issue.

The Court acknowledged the constitutional basis of an inverse condemnation claim in the Takings Clauses of the United States Constitution[31] and the Michigan Constitution of 1963.[32] Yet the Court stated that there is no precise formula for "determining whether a governmental invasion or intrusion constitutes a taking of private property."[33] With due respect to the Court, yes, there is such a precise formula: When the government physically invades or intrudes upon private property, not involving the exercise of its police power, or even *causes* a physical invasion or intrusion through the superinducing of water, it *unquestionably* constitutes a taking of private property, as discussed in the Michigan Supreme Court in *Peterman v Dep't of Natural Resources*.[34]

In *Peterman*, the State constructed jetties out into a lake that modified lake waves in a manner that led to the erosion of the Peterman's beach. It's hard to imagine a more precise rule than that articulated by the Michigan Supreme Court as a result of the government'sactions in *Peterman*:

> Const. 1963, art. 10, § 2 provides: "Private property shall not be taken for public use without just compensation therefor being first made or secured in a manner prescribed by law." In other words, "it can never be lawful to compel any man to give up his property, when it is not needed, or to lose it, whether needed or not, without being made whole."
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> Furthermore, because "'[t]he constitutional provision is adopted for the protection of and security to the rights of the individual as against the government,' ... the term 'taking' should not be used in an unreasonable or narrow sense." Hence, this Court has long held that "[t]he right of exclusion or the right of complete possession

30 The author acknowledges that there may be other examples of legitimate or necessary government intrusions, but the overall point should not be missed by attempting to prepare a comprehensive listing of such examples.

31 U.Ss Const am.V.

32 1963 Const. art 10, § 2.

33 *Id* at 571 (citation omitted).

34 *Peterman v Dep't of Natural Resources*, 446 Mich 177; 521 NW2d 499 (1994). *Peterman* contains a historic and detailed analysis of the Takings Clause and is required reading for understanding inverse condemnation, particularly a claim involving a physical invasion caused by the government.

> and enjoyment is one of the essential elements of property in land."
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> * * *
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> Accordingly, "' "where real estate is actually invaded by superinduced water, earth, sand or other material, ... **it is a taking within the meaning of the Constitution**."'"[35]

Furthermore, the *Peterman* Court made clear that the government is liable if its conduct is the proximate cause of the physical invasion or intrusion:

> In the instant case, the trial court found that defendant's actions were the proximate cause of the destruction of plaintiffs' beachfront property. Assuming that defendant did not directly invade plaintiffs' land, it undoubtedly set into motion the destructive forces that caused the erosion and eventual destruction of the property. Defendant was forewarned that the construction of the jetties could very well result in the washing away of plaintiffs' property, and the evidence reveals that the destruction of plaintiffs' property was the natural and direct result of the defendant's construction of the boat launch. The effect of defendant's actions were no less destructive than bulldozing the property into the bay. Defendant, therefore, may not hide behind the shield of causation in the instant case.[36]

The Michigan Supreme Court would later make clear in *K & K Constr v Dep't of Natural Resources* that, consistent with U.S. constitutional precedent, a physical invasion of private property amounts to a "categorical" taking of property and gives rise to "automatic recovery" to the property owner.[37]

The Court of Appeals did not cite *K & K Constr* in *Wiggins* or address the distinction between categorical and non-categorical takings. The Court did, however, cite to *Peterman*, but inexplicably paraphrased it as standing for the proposition that the government "*may cause a taking* of private property by flooding the property or diverting excess surface water onto the property."[38] The paraphrase is irreconcilable with the Supreme Court's clear statement that such conduct "*is a taking*," as well as the ample precedent regarding physical/categorical takings.

The genesis of the Court's error on the inverse condemnation claim perhaps is its discussion and reliance on takings cases *that did not involve physical invasions* prior to citing to *Peterman*. Specifically, the Court relies on the decisions in *Hinojosa v Dep't of Natural Resources*,[39] *Charles*

35 *Id* at 184, 188-89 and n16 (emphasis added) (quoting *Herro v Chippewa Co Rd Comm'rs*, 368 Mich 263, 275; 118 NW2d 271 (1962), *Grand Rapids Booming Co v Jarvis*, 30 Mich 308, 324 (1874) and *Pumpelly v Green Bay Co*, 80 US (13 Wall) 166, 181 (1872)) (emphasis added). *See also Ashley v Port Huron*, 35 Mich 296 (1877) ("A municipal charter never gives and never could give authority to appropriate the freehold of a citizen without compensation, whether it be done through an actual taking of it for streets or buildings, or by flooding it so as to interfere with the owner's possession. His property right is appropriated in the one case as much as in the other.").

36 *Id* at 191 (citation omitted). It is important to keep in mind that the actions of the State in *Peterman*, unlike the actions of the City of Burton in *Wiggins*, were expressly authorized by statute. Nevertheless, the physical invasion caused by the State rendered it liable for a taking.

37 456 Mich 570, 577; 575 NW2d 531 (1998) ("[In a] categorical taking, a reviewing court need not apply a case-specific analysis, and the owner should automatically recover for a taking of his property. . . . A person may recover for this type of taking in the case of a physical invasion of his property by the government (not at issue in this case), or where a regulation forces an owner to "sacrifice all economically beneficial uses [of his land] in the name of the common good . . . .") (quoting *Lucas v South Carolina Coastal Council,* 505 US 1003, 1015, 1019 (1992)). *See also Chelsea Inv Group LLC v City of Chelsea*, 288 Mich App 239, 262 n5; 792 NW2d 781 (2010) ("A 'categorical' taking occurs when there has been a physical invasion of a landowner's property or when a regulatory taking has deprived an owner of all economically and beneficial use of the land.") (citing *Lucas*, 505 US at 1015)); *Ligon v Detroit*, 276 Mich App 120, 132; 739 NW2d 900 (2007) (city was automatically liable for inverse condemnation for the razing of a house); *Lingle v Chevron USA, Inc*, 544 US 528, 537 (2005) ("The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property); *Yee v City of Escondido,* 503 US 519, 527 (1992) ("[T]he Takings Clause requires compensation if the government authorizes a compelled physical invasion of property."); *Kaiser Aetna v United States*, 444 US 164, 179-80; 100 (1979) ("In this case, we hold that the 'right to exclude', so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.").

38 *Wiggins*, 291 Mich App at 572 (emphasis added).

39 236 Mich App 537; 688 NW2d 550 (2004).

Murphy MD, PC v Detroit,[40] and *Heinrich v Detroit*[41] at the opening of its analysis of the inverse condemnation claim. Based on these cases, the Court articulated that, in order to maintain an inverse condemnation claim, a plaintiff, among other things, must demonstrate that the government's conduct was a substantial cause of the decline in value of the property and that the government abused its legitimate powers in affirmative action specifically directed toward the plaintiff's property that had the effect of limiting its use. Yet these limitations do not have application to an inverse condemnation claim premised upon the government physically invading, or causing a physical invasion, on private property of another.

Hinojosa involved a claim premised upon fire spreading from a home owned by the State as a result of tax delinquency to the plaintiff's property. The inverse condemnation claim in *Hinojosa* was complicated by the fact that the government had taken no action: it had not started the fire or otherwise taken any affirmative action causing it to spread. It simply owned the property where the fire started. The Court looked to *Murphy* and *Heinrich* for assistance, cases involving allegations of non-physical takings. Both of these cases involved claims premised upon allegations that the City's pre-condemnation project planning identifying the subject properties for potential condemnation injured the value of the subject properties, notwithstanding the fact that the City did not follow through with the condemnations. In other words, there were no allegations of a physical invasion caused by government action. The rules articulated in these cases cannot be conflated to a fact scenario involving a physical invasion, however, without directly contradicting *Peterman* and the well-settled and controlling law governing inverse condemnations involving physical invasions proximately caused by the government.[42]

In addition to missing the distinction between physical and non-physical takings, the Court also erred in *Wiggins* by restricting the City's liability at the time the City "handed-off" the drain system to the adjacent property owners. The Court failed to cite any precedential support for its ruling, but did rely on a quote from the California appellate decision in *Bach v Butte Co*: "[I]t is elementary that an inverse condemnation action--being based upon the taking or damaging of property for public use without just compensation--requires state action and, therefore, cannot be asserted against private parties." [43] Yet, the Court already found "state action": it acknowledges that the City constructed the drain.

On its face, the *Bach* quote does not support a "hot potato" theory of takings liability that would allow the City to transfer away any liability to the adjacent neighbors. Rather, this limitation on the City's liability appears to conflict with the broad liability for inverse condemnation articulated in *Peterman*, where the Michigan Supreme Court made clear that the State could not "hide behind the shield of causation" when it "set into motion the destructive forces" that caused erosion as "the natural and direct result."[44] Moreover, the constitutional remedy for a taking is the payment of just compensation, which Michigan courts have defined as "the amount of money which will put the person whose property has been taken in as good a position as the person would have been had the taking not occurred."[45] The Court cited no precedential basis to spare the City from the broad liability imposed upon the Mahlers and Heckmans for their role in the trespass, nor does the City merit any such special protection.

Conclusion

Although the remand of *Wiggins* provided even further opportunity to address and resolve important questions involving property rights law, pragmatism prevailed and the parties settled following case evaluation. The Wigginses suceeded in their primary goal to remove the drain system from their property and obtained modest remuneration for their efforts.

40 201 Mich App 54; 506 NW2d 5 (1993).

41 90 Mich App 692; 282 NW2d 448 (1979).

42 Although the Court in *Hinojosa* does cite *Peterman* in the Court's trespass-nuisance analysis for the proposition that takings claim and a trespass-nuisance claim are distinct causes of action, the Court does not cite *Peterman* in its taking analysis nor does it discuss physical taking cases or the difference between physical and non-physical takings. *Hinojosa*, 236 Mich App at 546, 548-50. Clearly, it was treating the claim as premised upon a non-physical taking. To opine otherwise would put the decision in direct conflict with *Peterman* and other controlling Michigan cases. *See, eg*, *supra* notes 22 & 24.

43 215 Cal App 3d 294, 307; 263 Cal Rptr 565 (1989).

44 *Peterman*, 446 Mich at 191.

45 See M Civ JI 90.05 and cases cited therein.

Nevertheless, the Court of Appeals decision in *Wiggins* remains significant because it provides an excellent roadmap of the property rights that can be implicated by the relatively simple act of changing the flow of surface water on one's property. The Court thoroughly addresses easement law, the distinction between trespass and nuisance, the surface water natural flow doctrine, and related governmental immunity. A major shortcoming in the decision, however, is the Court's analysis of the inverse condemnation claim against the City of Burton. By relying on non-physical takings cases instead of controlling cases involving physical takings, the decision adds confusion to the takings jurisprudence. Since the controlling cases are Michigan Supreme Court decisions, which the Court of Appeals cannot modify or overrule, the confusion should be ignored.

Notwithstanding the resolution of the inverse condemnation claim, *Wiggins* stands as an important safeguard for private property rights involving surface water flow as between neighboring private property owners.