# STATE OF MICHIGAN

# COURT OF APPEALS

MICHAEL SPOONER AND DEBRA SPOONER,

Plaintiff-Appellants,

v

PAUL LEIDER, ST. CLAIR COUNTY DRAIN COMMISION AND THOMAS DONAHUE, ST. CLAIR COUNTY DRAIN COMMISSIONER,

Defendant-Appellees.

UNPUBLISHED
April 25, 1997

No. 175965
St. Clair Circuit
LC No. 93-000940 CC

Before: Young, P.J., and Holbrook, and J.R. Ernst,* JJ.

PER CURIAM.

Plaintiffs appeal as of right from orders denying their request for writ of mandamus against Commissioner Thomas Donahue, granting defendants' motions for summary disposition, and denying their motion for reconsideration. We affirm.

## I. Facts and Proceedings

### A. Plaintiffs' Property

Plaintiffs entered an "as is" agreement to purchase property from defendant Paul Leider in November 1989.[1] Plaintiffs allege that they informed Leider that they planned to build a house on the property. The deal was closed in February 1990, and plaintiffs began construction on their house. In April 1990, after extensive rainfall, waters from the Graham Drain backed into the culvert adjacent to plaintiffs' land which then flooded onto plaintiffs' land. In January 1991, thawing snow and rain caused flood waters to cover plaintiffs' property. In November 1992, the land was flooded again, and flooding recurred in March 1993.

* Circuit judge, sitting on the Court of Appeals by assignment.

Paul Leider purchased the property for investment purposes in April 1989 from Jim Herman. In an affidavit, Leider testified that he rarely visited his property and had no knowledge of a flooding problem. Herman testified in his deposition that he told all prospective purchasers "the same thing", but could not recall whether he mentioned a water problem to Leider.

B. Problems with the Graham Drain

In 1979, Berlin Township filed a petition with Commissioner Donahue's office to clean Branch 1 of the Graham Drain. Commissioner Donahue testified at his deposition that the cleaning could not be accomplished due to an insufficient outlet, and he advised the township to either drop the project or petition to extend the drain. According to Commissioner Donahue, the township elected to drop the project.

In 1989, property owners from St. Clair County filed a petition to clean and extend the Graham Drain to the Macomb County Line, and clean Branch 1 of the drain. After the project was approved, Commissioner Donahue hired a surveyor to survey the land and prepare a plan to clean the entire drain and extend it to the Macomb County line. The surveyor reported that there was an insufficient outlet. Commissioner Donahue testified that after receiving this report, he inspected the land with the surveyor in order to find a sufficient outlet. When none was found, he contacted the Public Works Commissioner in Macomb County. Macomb County's commissioner was unable to identify a sufficient outlet and informed Commissioner Donahue that Macomb County would not help with the drain problem.

On June 10, 1991, Commissioner Donahue met with residents at a Berlin Township meeting and reported that the drain had a history of problems. Commissioner Donahue explained that a petition filed by St. Clair County residents would be futile because the water drains into Macomb County, and Macomb County did not wish to cooperate in solving the problem. Commissioner Donahue said that the only options available to citizens were to clean the drain themselves or petition the county to do it, but Donahue cautioned that either option could result in liability to downstream residents.

C. Plaintiffs' Case

After their property flooded in 1993, plaintiffs filed this complaint, alleging inverse condemnation, trespass-nuisance, and mandamus against Commissioner Donahue. Plaintiffs also brought a claim against Paul Leider for fraudulent concealment. After a show cause hearing, the plaintiffs' request for a writ of mandamus against the Commissioner was denied. The court explained that, because plaintiffs failed to petition the drain commission, plaintiffs did not exhaust their administrative remedies, and thus failed to show cause to support a writ of mandamus.

Commissioner Donahue and the drain commission then moved for summary disposition as to the mandamus count and the remaining counts of plaintiffs' complaint, trespass-nuisance and inverse condemnation. The trial court granted summary disposition to these defendants as to the mandamus count for the same reasons stated at the hearing, i.e., failure to exhaust administrative remedies. However, the court denied summary disposition as to the inverse condemnation and trespass-nuisance counts, reasoning that these counts remained viable despite plaintiffs' failure to petition the drain

commission. Commissioner Donahue and the drain commission then filed another motion for summary disposition as to the remaining counts. The court granted summary disposition for defendants as to the inverse condemnation count, reasoning that Commissioner Donahue had not directed any action towards plaintiffs' property, as well as the trespass-nuisance count, concluding that plaintiff failed to establish that the nuisance was caused or controlled by defendants. Leider also moved for summary disposition as to the fraudulent concealment claim. The trial court granted this motion also, finding that plaintiff failed to establish that Leider had actual knowledge of flooding problem. The trial court subsequently denied plaintiffs' motion for reconsideration, concluding that the motion for reconsideration raised the same arguments which were made in response to the motions for summary disposition.[2]

Plaintiffs contend on appeal that the trial court erred in denying their request for mandamus against Commissioner Donahue. They argue that the Commissioner had a clear legal duty to maintain and/or clean the Graham Drain. Alternatively, plaintiffs argue that, if filing a petition is required, plaintiffs were excused from any obligation to file a petition, since filing a petition would have been futile. In addition, plaintiffs challenge the orders dismissing their claims of inverse condemnation, trespass-nuisance, and fraudulent concealment.

## II. Denial of Mandamus

Plaintiffs claim that denial of mandamus was error because the Drain Code mandates that the drain commissioner assess for additional funds to clean and extend a county drain in the absence of a petition. Alternatively, plaintiffs argue that any duty to file a petition is excused based on futility and/or constructive fraud.

A trial court's decision to deny a writ of mandamus will not be reversed absent an abuse of discretion. *Michigan Waste Systems, Inc v Department of Natural Resources*, 157 Mich App 746, 760; 403 NW2d 608 (1987). Since mandamus is an extraordinary remedy, a plaintiff must fulfill the following requirements to warrant relief: "(1) the plaintiff must have a clear legal right to performance of the specific duty sought to be compelled; (2) the defendant must have the clear legal duty to perform such act; and (3) the act must be ministerial, 'where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment.'" *Delly v Bureau of State Lottery*, 183 Mich App 258, 260-261; 454 NW2d 141 (1990) (quoting *Carlson v City of Troy*, 90 Mich App 543, 547; 282 NW2d 387 (1979) and *Toan v McGinn*, 271 Mich 28, 34; 260 NW 108 (1935)). Mandamus is properly granted only when there is, in practical terms, no other remedy, legal or equitable, which might achieve the same result, and the party seeking the writ must prove entitlement to relief. *Delly, supra*, 183 Mich App 260-261.

Plaintiffs sought mandamus to require that Commissioner Donahue clean the Graham Drain of brush and overgrowth. Plaintiffs contend that such action is mandated by section 196 of the Drain Code, whenever a drain commissioner deems that *maintenance and repair* is necessary for the drain. MCL 280.196; MSA 11.1196. Commissioner Donahue and the drain commission respond that the action requested by plaintiffs actually involves *cleaning and extending* the Graham Drain. To *clean*

*and extend* a county drain, a petition is required. MCL 280.191; MSA 280.1191. We conclude that under either section, plaintiff cannot establish entitlement to mandamus relief.

A. Mandamus Unavailable for Discretionary Action

County drain commissioners have jurisdiction over all drains within their respective counties. MCL 280.23; MSA 11.1023. The Drain Code provides that the commissioner or his duly appointed delegate may inspect the drain annually. MSA 280.196(1); MSA 11.1196(1). If the inspection reveals the necessity for maintenance and repair, the Commissioner may, without petition, expend funds for maintenance and repair as long as the cost does not exceed $2,500 per mile. MCL 280.196(4); MSA 11.1196(4). If the Commissioner determines that the needed repairs require funding in excess of $2,500 per mile, the Commissioner cannot spend in excess of this amount unless the expenditure has been approved by resolution of the governing body of each township, city and village affected by more than twenty percent of the cost. MCL 280.196(5); MSA 11.1196(5). Also, if the drainage fund does not contain sufficient funds, the drain commissioner shall reassess the drainage district for the funds for the inspection, maintenance, and repair "according to the benefits received." MCL 280.196(6); MSA 11.1196(6).

Plaintiffs argue that in the absence of a petition, Commissioner Donahue was required to reassess the district for the necessary funds because he acknowledged the need for cleaning the drain, estimated that the cost would exceed the statutory maximum of $2,500 per mile, and found that the drainage fund did not contain sufficient funds. Although the statute authorizes this action in the absence of petition, plaintiffs ignore the requirement that such an expenditure be approved by the governing body which will be affected, and that the drain commissioner's assessment is based upon determining the "benefits received."

We hold that denial of mandamus is proper for two reasons. First, plaintiffs' have not shown that Berlin Township or other local governments, which could be liable for the cost of this project, have approved this expenditure.[3] Second, even if there was approval by the affected townships, Commissioner Donahue's determination of the extent of the benefit received and thus, the amount to be reassessed, is an exercise of discretion. Because the actions plaintiffs believe the Commissioner should have undertaken were ministerial actions, involving no exercise of discretion or judgment, denial of mandamus was proper on this basis alone. *Delly*, *supra*, 183 Mich App 261.

B. A Petition Was Required to Extend the Drain

The lower court's denial was also proper on the basis that it actually denied plaintiffs' request, i.e., failure to exhaust administrative remedies. In that the relief plaintiffs sought involved *cleaning and extension* of the drain, a petition must be filed by at least five of the affected property owners or 50% of the landowners that would be affected by the project, which requested cleaning and extension of the drain. MCL 280.191; MSA 11.1191. As such, plaintiffs cannot establish, as a condition precedent to mandamus, that they had a clear legal right to *cleaning and extension* of the Graham Drain.

The Drain Code of 1956, MCL 280.1 et seq; MSA 11.1001 et seq, represents the Legislature's attempt to codify all laws regarding drains and to provide for detailed, specific, and exclusive procedures to be followed in proceedings to construct and maintain drains. *Toth v Waterford Twp*, 87 Mich App 173, 176; 274 NW2d 7 (1978); *Muskegon Twp v Muskegon County Drain Comm'r*, 76 Mich App 714; 257 NW2d 224, lv den 402 Mich 834 (1977). Absent fraud, all matters pertaining to the locating, constructing, cleaning, extending, etc., of drains are to be determined according to the procedures set forth in the Drain Code. *Toth, supra*, 87 Mich App 176.

Plaintiffs argue that despite petitions filed 1979 and 1989, Commissioner Donahue has failed to resolve the problem, such that a petition would have been futile. A failure to exhaust administrative remedies will not preclude judicial review where the procedural requirements do not afford the aggrieved an adequate remedy. See MCL 24.301; MSA 3.560(201); *IBM v Department of Treasury*, 75 Mich App 604, 610; 255 NW2d 702 (1977). That is not the case here.

For *cleaning* or *extending*, the Drain Code provides that a petition may be filed by five property owners, or 50% of the landowners that would be affected by the project. MCL 280.191; MSA 11.1191; see also MCL 280.2; MSA 11.1002. The petition instigates other procedures under the code which outline the manner in which funding and approval for a project is raised.[4] Hence without the proper petition, a drain commissioner simply cannot undertake a project to clean and extend a drain. See MCL 280.194; MSA 11.1194; cf. *Bridgeport Charter Twp v Saginaw County Drain Comm'r*, 118 Mich App 334, 339; 324 NW2d 618 (1982); *Tinsman v Monroe Probate Judge*, 82 Mich 562, 564; 46 NW 780 (1890).

Plaintiffs alternatively argue that their failure to file a petition should be excused based upon their detrimental reliance on Commissioner Donahue's alleged statements that filing a petition would be futile. Specifically, plaintiffs contend that statements made by Commissioner Donahue at a 1991 Berlin Township meeting constituted constructive fraud. Constructive fraud provides an equitable remedy to persons who detrimentally rely on false information although the person representing the false information did not intend to deceive. *Goodrich v Waller*, 314 Mich 456, 462; 22 NW2d 862 (1946). Proof of actual dishonesty or fraudulent intent is not necessary. Instead, a plaintiff must prove that the person gained a substantial benefit from the plaintiff's reliance on the false information. *Id*. Hence, plaintiffs must initially prove that the information they relied upon was false. Plaintiffs have failed to do so.

According to the record, in the minutes from the relevant meeting, the Commissioner explained the history of problems associated with the drain, and that a petition by St. Clair County residents would be futile because Macomb County would not cooperate. He also advised that cleaning the drain would cause further flooding downstream, and that the citizens' only options were to file a petition with the county or clean the drain themselves. But he cautioned the residents that "downstream" residents may sue them for damage caused by the increased flooding on their property. Plaintiffs cite these minutes as evidence that they should be excused from filing a petition with the drain commissioner under a constructive fraud theory.

Plaintiffs failed to demonstrate how the statements attributed to the Commissioner in the minutes were false. As stated above, under the Drain Code, a petition instigates the procedures for cleaning and extending a county drain. Moreover, the Drain Code allows the drain commissioner to extend a drain into another county "to secure a proper outlet, *provided* such extension is approved by the drain commissioner and board of supervisors in each county" that would be affected. MCL 280.23; MSA 11.1023 (emphasis supplied). Further, the statements are consistent with a letter sent to plaintiffs, dated August 12, 1991, in which Commissioner Donahue clarified that there were problems with Macomb County's recalcitrance, and emphasized that plaintiffs were required to file a petition to initiate legal action. Plaintiffs failed to establish that the Commissioner's statements were false. Consequently, plaintiffs are not excused from their failure to file a petition with the drain commission.

C. Summary

In sum, we hold that a drain commissioner's duty to *maintain and repair* a drain exists in the absence of a petition. However, the duty to seek additional assessments is an act requiring the exercise of discretion to determine the necessity and the amount of the assessments. Moreover, in the absence of a petition, plaintiffs have not established a clear legal right to mandate that the drain commission *clean and extend* the drain. Accordingly the court did not abuse its discretion when denying plaintiffs' request for mandamus, and later dismissing the mandamus count from plaintiffs' complaint.

III. Governmental Liability for Intrusion on Plaintiffs' Property

Plaintiffs maintain that even in the absence of a petition, Commissioner Donahue and the drain commission are subject to liability for their failure to solve the problems with the Graham Drain. Plaintiffs contend that Commissioner Donahue's refusal to act has caused the flooding, thereby depriving them of the use and enjoyment of their property. We disagree and hold that plaintiffs have failed to establish a basis to maintain their claims of inverse condemnation or trespass-nuisance.

A. Inverse Condemnation

Plaintiffs argue that dismissal of their inverse condemnation action requires reversal because Commissioner Donahue's inaction amounted to government interference that deprived

them of the use and enjoyment of their property. We disagree.

The trial court granted defendants' motion regarding this count for failure to state a claim. MCR 2.116(C)(8). A motion pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the pleadings alone. *Marcelletti v Bathani*, 198 Mich App 655, 658; 500 NW2d 124 (1993). The court accepts all well-pleaded facts as true and considers any reasonable inferences or conclusions which can be drawn from these facts. *Id*. The motion should be granted only when the claim is so clearly unenforceable as a matter of law such that no factual development could justify recovery. *Wade v Department of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992); *Marcelletti, supra*, 198 Mich App 658.

Proof of inverse condemnation requires that the government action is specifically directed toward the landowner's property, and that it permanently deprives the property owner of possession or use of their property. *Charles Murphy, MD v Detroit*, 201 Mich App 54, 56; 506 NW2d 5 (1993). Alternatively, a property owner must show that government action was a substantial cause of the decline of his property's value and that the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property. *In re Acquisition of Virginia Park*, 121 Mich App 153, 160-161; 328 NW2d 602 (1982).

Plaintiff urges government interference is shown by Commissioner Donahue's refusal to act, as evidenced by his response to the 1979 and 1989 petitions, and in his statements at the Berlin Township meeting in 1991. Inasmuch as plaintiffs' claim is based on Commissioner Donahue's alleged *inaction*, plaintiffs cannot establish that damage caused by the flooding resulted from action directed *toward* their property. Plaintiffs have also failed to demonstrate that Commissioner Donahue's actions were an abuse of his legitimate powers. *Virginia Park*, *supra*, 121 Mich App 161; see also discussion, *supra*, section II. Thus, plaintiff cannot maintain a claim of inverse condemnation.

B. Trespass-Nuisance

The trial court found that while the evidence established that Commissioner Donahue had jurisdiction over the Graham Drain, plaintiffs failed to prove that the flooding was caused or controlled by Commissioner Donahue. The trial court concluded that plaintiffs did not establish the trespass-nuisance exception to governmental immunity and granted defendants motion for summary disposition pursuant to MCR 2.116(C)(7) and (C)(10).

This Court reviews a trial court's grant of summary disposition de novo to determine whether the moving party was entitled to judgment as a matter of law. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994). If a governmental body or agent moves for summary disposition pursuant to MCR 2.116(C)(7), the court reviews the complaint to see whether facts have been pleaded justifying a finding that recovery in a tort cause of action is not barred by governmental immunity. *Vermilya v Dunham*, 195 Mich App 79, 81; 489 NW2d 496 (1992). A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). In reviewing a (C)(10) motion, a court considers pleadings, affidavits, depositions, admissions, and any evidence in favor of the nonmoving party, granting that party the benefit of any reasonable doubt. *Id*. Summary disposition is appropriate when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Id*.

A landowner, who seeks recovery of damages under the trespass-nuisance exception to governmental immunity, must prove that a physical intrusion caused a trespass or interference with the use or enjoyment of his or her land and that it was set in motion by the government or its agents, resulting in personal or property damage. *Hadfield v Oakland County Comm'r*, 430 Mich 139, 169; 422 NW2d 205 (1988). The *Hadfield* Court held that by virtue of the Takings Clause, governmental agents could be liable for personal and property injury arising from a government caused nuisance. *Id.*, 168-169. The elements of trespass-nuisance include: condition (nuisance or trespass); cause (physical

intrusion); and causation or control (by government). *Hadfield*, *supra*, 430 Mich 169. Causation can be established by government's failure to act as well as direct action. *Id.*, 185.

Relying on *Hadfield*, plaintiffs argue that Commissioner Donahue was clearly liable for trespass-nuisance because, as drain commissioner, he "controlled" the Graham Drain, and hence, the nuisance. Specifically, plaintiffs argue that Commissioner Donahue's failure to solve the Graham Drain problem in 1979 and 1989, created the condition that caused the flooding on their property. Plaintiffs contend that this establishes that Commission Donahue's failure to act caused the flooding, and conclude that per *Hadfield*, he is clearly liable for the damage caused by the flooding. We disagree.

Liability cannot be imposed simply when a government agent has authority over an instrumentality causing the nuisance. In *McSwain v Redford Township*, 173 Mich App 492, 498; 434 NW2d 171 (1988), this Court emphasized that liability for trespass-nuisance turns upon whether the defendant was in control either through ownership or otherwise.

> "'We have found no authority imposing liability for damage caused by a nuisance where the defendant has not either created the nuisance, owned or controlled the property from which the nuisance arose, or employed another to do work which he knows is likely to create a nuisance.' But, the governmental unit has the requisite control, and therefore may be subject to liability, if it has a statutorily imposed obligation to abate the nuisance but fails to do so. See, *Hadfield, supra*, pp 177-185. Moreover, the governmental unit cannot escape liability for a nuisance created by a third person on property which it does not own if, by statute, it is charged with the responsibility of performing the activity which gave rise to the nuisance. In such case, the governmental unit against has the requisite control over the nuisance. *Id.*" [*McSwain*, *supra*, 173 Mich App 499 (quoting *Stemen v Coffman*, 92 Mich App 595, 598; 285 NW2d 305 (1979), lv den 408 Mich 875 (1980)).]

In the instant case, plaintiffs have relied on *Hadfield* in support of their allegations that Commissioner Donahue's refusal to act caused the flooding.[5] Although the *Hadfield* Court dealt with an apparently analogous factual setting, plaintiffs' evidence actually refutes their contention that *inaction caused* the flooding on their property.[6] Unlike the inactive drain commissioner in *Hadfield*, Commissioner Donahue had taken affirmative steps within his authority under the Drain Code to resolve the problem since 1979. In fact, after the 1989 petition, Commissioner Donahue successfully completed a project to clean the upper end of Branch 1 of the Graham Drain.

The record establishes that the flooding on plaintiffs' property cannot be alleviated unless the drain is cleaned *and* extended. However, the core obstacle to solving the problems with the Graham Drain is the absence of a sufficient outlet in St. Clair County to which accumulated water could pass. Per MCL 280.23; MSA 11.023, Commissioner Donahue cannot extend the drain into another county without the approval of the drain commissioner and board of supervisors in the affected county. In light of Macomb County's recalcitrance in solving the problem, Commissioner Donahue has no meaningful options. For example, Commissioner Donahue testified in his deposition that without a sufficient outlet,

a clean drain would transfer the flooding problem to downstream residents. He also explained that a clean drain would simply delay, but not prevent water from accumulating on plaintiffs' property.

Plaintiffs have not refuted this evidence. Indeed, plaintiff Michael Spooner testified in his deposition that an inspection after he purchased the property disclosed that there was a water table under the property and that he was advised to "build up." Also, plaintiffs' property is lower than the culvert such that the risk of flooding exists whenever the culvert flows over its capacity. As such, simply cleaning the drain would not prevent flooding on plaintiffs' property.

Therefore, plaintiffs cannot establish that Commissioner Donahue failed in his statutory obligation to abate the nuisance. Consequently, they cannot establish that he has the requisite control over the nuisance to succeed in their claim of trespass-nuisance. *McSwain*, *supra*.

The undisputed facts do not establish a trespass or interference set in motion by the government or its agents. *Hadfield*, *supra*. Therefore, the trial court correctly concluded that defendants were not subject to liability under the trespass-nuisance exception to governmental immunity.

## IV. Fraudulent Concealment

Plaintiffs next argue that the lower court erred in dismissing their fraudulent concealment claim against defendant Leider. The trial court dismissed the claim after finding that plaintiffs' proofs were insufficient to create a disputed issue of fact that Leider knew of a flooding problem prior to selling to plaintiffs. After reviewing the evidence in a light most favorable to plaintiffs, we affirm. MCR 2.116(C)(10); *Radtke*, *supra*, 442 Mich 374.

Plaintiffs contend that Leider knew that there was a flooding problem on the property and failed to disclose this problem before selling the property to plaintiffs. A purchaser may allege fraudulent concealment based on the seller's failure to disclose a hidden defect. *Lorenzo v Noel*, 206 Mich App 682, 687; 522 NW2d 724 (1994) (this is so even in the context of an "as is" sale); *Shimmons v Mortgage Corp of America*, 206 Mich App 27, 29; 520 NW2d 670 (1994). To prevail, plaintiffs must prove that at the time of the sale, defendant Leider knew of a hidden defect, and that they had no knowledge of the defect. *Clemens v Lesnek*, 200 Mich App 456, 459-461; 505 NW2d 283 (1993).

Leider purchased the property in April 1989 from Jim Herman. Herman testified that he owned the property for seven years before Leider, and that he observed flooding a few times after the snow thawed in the Graham Drain. Herman also testified that he told Leider that he would have "to build it up when he builds or dig a pond," but he could not recall if he explained to Leider any reasons for this advice or whether there was a water problem. Herman recalled that Leider told him that he was buying the land as an investment. After entering an "as is" purchase agreement in November 1989, Leider conveyed the property to plaintiffs in February 1990. Plaintiff Michael Spooner testified in his deposition that he neither asked Leider about a water problem nor did Leider make any statement regarding the existence or absence of a water problem. In his affidavit, Leider averred that he rarely visited the property during his ownership and that he had no knowledge of a flooding problem.

To prove that Leider knew of the flooding, plaintiffs rely primarily on Herman's deposition testimony in which he stated "I told him about the flooding; I told everyone I sold to the same thing." However, Herman made this statement in response to a question asking what he stated to *plaintiff* Michael Spooner, not Leider. As stated, Herman could not recall what, if anything, he mentioned to *Leider* about a water problem. Therefore, the trial court correctly concluded that plaintiffs' evidence was insufficient to create a disputed issue of fact regarding Leider's knowledge of the flooding.

## V. Conclusion

In summary, we affirm the lower court's orders granting summary disposition to all defendants. First, plaintiffs' request for mandamus was improper as it sought to compel discretionary action, and further, plaintiffs' failure to file a petition precluded finding that plaintiffs had a clear legal right to mandamus. Second, plaintiffs cannot maintain their inverse condemnation claim based on Commissioner Donahue's alleged *inaction*. Third, plaintiffs' evidence was insufficient to show that Commissioner Donahue's actions or alleged inaction caused the flooding on their property, such that the trespass-nuisance claim was properly dismissed. Finally, plaintiffs could not proceed against defendant Leider for fraudulent concealment because the evidence was insufficient to establish that defendant Leider had actual knowledge of the flooding problem.

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Donald E. Holbrook, Jr.

[1] The property is located in Berlin Township, St. Clair County.

[2] Generally, a motion for reconsideration must demonstrate a "palpable error" by which the court and the parties have been misled. MCR 2.119(F)(3). A motion which merely presents the same issue as ruled on by the court, either expressly or by reasonable implication, will not be granted. *Id*. The grant or denial of a motion for reconsideration is a matter within the discretion of the trial court. *Carson v Auto-Owners Ins Co*, 181 Mich App 600, 605; 450 NW2d 6 (1989). We hold that plaintiffs failed to show "palpable error" which would justify relief for the reasons set forth in this opinion. Because we affirm the trial court, we find the court did not abuse its discretion when denying plaintiffs' motion for reconsideration.

[3] Commissioner Donahue testified in his deposition, that after property owners filed a petition in 1989, his office determined that the necessary cleaning and extension of the drain would cost $20,000 per mile of the drain.

[4] Under the Drain Code, after receiving a petition, the drain commissioner may proceed in the manner provided for locating and constructing drains. MCL 280.191; MSA 11.1191; see procedures in MCL 280.51 et seq; MSA 11.1051 et seq. This requires hiring a surveyor to inspect and prepare a plan for the project, MCL 280.52; MSA 11.1052, and appointing an independent review board to conduct a hearing and determine the necessity of the project and find that it is conducive to the public health,

convenience, and welfare, MCL 280.72; MSA 11.1072. If the petition is approved, the Drain Code provides specific procedures to determines the taxes to be assessed, notifying governmental bodies that will be affected by the cost of the project, and obtaining rights of way over the lands that will be affected. MCL 280.72-75; MSA 11.1072-1075; see also MCL 280.261 et seq; MSA 11.1261 et seq.

[5] Commissioner Donahue argues that plaintiffs' failure to file a petition deprived him of jurisdiction to clean the drain, and thus, precludes a finding that Commissioner Donahue had control over the cause of the flooding. The plaintiffs in *Hadfield* had not filed a petition with the drain commissioner. Nevertheless, the Court imposed liability on the drain commissioner based on his awareness of the problem and its cause and continuous apathy towards the problem. *Id*., 178 n 20, 184. Thus, we concur with the lower court, that plaintiffs' failure to have a petition filed would not preclude a claim of trespass-nuisance if plaintiffs could establish that the flooding was caused by Commissioner Donahue's failure to act.

[6] In *Hadfield*, the plaintiffs' land flooded repeatedly. *Hadfield*, *supra*, 430 Mich 177. The flooding was caused by water backing onto their land from clogged drains, a condition created by neighboring landowners who installed culverts along the county drain. *Id.*, 177-178. The drain commissioner essentially ignored the construction when some of the culverts were installed, and when plaintiffs alerted the commissioner to the problem as early as 1964, the commissioner took no action. *Id.*, 178 & n 19. However, the plaintiffs did not petition the drain commissioner to clean out the drains. Instead, they resorted to cleaning the drain themselves, and employing other temporary solutions. *Id*., 178. The drain commissioner's office finally took action in 1973, and at that point, simply notified the owners, who had installed the culverts, that the culverts had to be removed. After unsuccessful attempts at negotiating removal of the culverts, the drain commissioner eventually sued those landowners in 1976. *Id*. at 179.

In 1976, the plaintiffs sued the drain commissioner, alleging that the drain commissioner should have prevented those landowners from installing the culverts, and was also liable for the subsequent failure to remove them. *Id*., 178-179. The *Hadfield* Court held that the facts represented a clear example of trespass-nuisance and specifically found that the flooding was "caused by the county drain commissioner's failure to act." *Id.*, 184.

Commissioner Donahue's repeated attempts at solving the problem sharply contrast the apathetic drain commissioner in *Hadfield*. Instead, Commissioner Donahue's "control" over the problem is similar to that of the township board in *McSwain*.

In *McSwain*, the defendant township issued building and occupancy permits to residential homeowners in a subdivision who installed septic tank systems on their land. When many of the septic systems failed, raw sewage rose to the surface and collected on the plaintiffs' property. The plaintiffs, also residential homeowners, sued the township for issuing permits knowing the land was unsuitable for septic systems. *McSwain*, *supra*, 173 Mich App 494. This Court held that the township did not have "control" over the nuisance because the collection of sewage was not caused by the township's action

or inaction; the fault was with the owners of the septic systems. *Id*., 499. The township merely issued permits to those residents, and this Court found this connection to the nuisance too tenuous to impose liability. *Id*. This Court also reasoned that no statutory obligation existed to abate the nuisance. *Id*., 500. The statute in question merely vested authority in the township to make public improvements with public approval. Local residents had defeated a referendum proposal for a sewer system, and although the township could have taken other steps to install a sewer system, there was no mandate to do so. *Id.*, 499-500. The township did not have an affirmative duty to clear up the problem. *Id.*, 500-501.

Like the *McSwain* township board, Commissioner Donahue acted within his authority to solve the problems created by an insufficient outlet for the Graham Drain. However, because Commissioner Donahue did not have authority to extend the drain without Macomb County's approval, the problem could not be abated.