STATE OF MICHIGAN

COURT OF APPEALS

PAUL HELBER, DIANE HELBER, SUSAN IRWIN, JOHN IRWIN, JAMES NIETERS and PAMELA NIETERS,

Plaintiffs-Appellants,

v

CITY OF ANN ARBOR,

Defendant-Appellee.

UNPUBLISHED
October 26, 2004

No. 247700
Washtenaw Circuit Court
LC No. 00-001201-CE

HOWARD ANDREWS and MURIEL D. ANDREWS,

Plaintiffs,

and

KATHY ANN MOILANEN, EDWARD M. VUYLSTEKE, LAWRENCE THALL, MARCELLA THALL and MICHAEL THALL,

Plaintiffs-Appellants,

v

CITY OF ANN ARBOR,

Defendant-Appellee.

No. 247701
Washtenaw Circuit Court
LC No. 00-001202-CE

WARREN G. PALMER, ZERILDA PALMER, ROBERT ZIMMERMAN, ENID ZIMMERMAN, GREGORY HAWKINS and MASADA HABHAB,

Plaintiffs-Appellants,

v

No. 247702
Washtenaw Circuit Court
LC No. 00-001203-CE

CITY OF ANN ARBOR,

Defendant-Appellee.

CAROL JACOBSON, JED JACOBSON, DILIP NIGAM and SABITA NIGAM,

Plaintiffs-Appellants,

v

No. 247703
Washtenaw Circuit Court
LC No. 00-001205-CE

CITY OF ANN ARBOR and WASHTENAW COUNTY DRAIN COMMISSIONER,

Defendants-Appellees,

and

LANS BASIN, INC.,

Defendant.

Before: Hoekstra, P.J., and Owens and Hood, JJ.

PER CURIAM.

These four consolidated appeals involve trespass-nuisance and unconstitutional taking claims raised by plaintiff homeowners against defendants city of Ann Arbor and the Washtenaw County Drain Commissioner arising from August 1998 and June 2000 sewer backups into plaintiffs' basements. Plaintiffs appeal as of right, challenging the circuit court's orders granting defendants summary disposition of plaintiffs' claims pursuant to MCR 2.116(C)(8) (failure to state a claim). We affirm.

I

Plaintiffs first contend that the circuit court erred in finding that they failed to state a claim of trespass-nuisance within either their original or amended complaints.

> This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. . . .
>
> * * *

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5). [*Maiden v Rozwood*, 461 Mich 109, 118-120; 597 NW2d 817 (1999) (citation omitted).]

Because this case arose before our Supreme Court's April 2, 2002, decision in *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002), this Court must apply the limited trespass-nuisance exception to governmental immunity delineated by the Supreme Court in *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988). In *Hadfield*, the Supreme Court defined "trespass-nuisance" as "a direct trespass upon, or the interference with the use or enjoyment of, land that results from a physical intrusion caused by, or under the control of, a governmental entity." *Id*. at 145. The Supreme Court set forth as follows the necessary elements of a trespass-nuisance claim:

> Therefore, we find that plaintiffs will successfully avoid a governmental immunity defense whenever they allege and prove a cause of action in trespass or intruding nuisance. Trespass-nuisance shall be defined as trespass or interference with the use or enjoyment of land caused by a physical intrusion that is set in motion by the government or its agents and resulting in personal or property damage. The elements may be summarized as: condition (nuisance or trespass); cause (physical intrusion); and causation or control (by government). [*Id*. at 169.]

The plaintiff need not establish that the government acted with negligence. *CS&P, Inc v City of Midland*, 229 Mich App 141, 145-146; 580 NW2d 468 (1998).

In this case, the circuit court found that plaintiffs' pleadings failed to sufficiently allege the first element of a trespass-nuisance claim, a condition of trespass or nuisance. "'[T]respass is an invasion of the plaintiff's interest in the exclusive possession of his land, while nuisance is an interference with his use and enjoyment of it.'" *Hadfield*, *supra* at 151, quoting Prosser & Keeton, Torts (5th ed), § 87, p 622. "Recovery for trespass to land in Michigan 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." *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 67; 602 NW2d 215 (1999). A "direct or immediate" invasion "for purposes of trespass is one that is accomplished by any means that the offender knew or reasonably should have known would result in the physical invasion of the plaintiff's land"; "'[i]t is enough that an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter.'" *Id*. at 71, quoting 1 Restatement Torts, 2d, § 158, comment i, p 279.[1] The trespasser must intend to intrude on the property of another without authorization to

[1] In *Adams*, *supra* at 71 n 15, this Court equated the direct or immediate invasion of trespass "as something akin to proximate cause."

do so. *Buskirk v Strickland*, 47 Mich 389, 392; 11 NW 210 (1882) (finding the defendants liable in trespass for acts intentionally done that directly and necessarily caused immediate injury); *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 82-83; 592 NW2d 112 (1999); *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 195; 540 NW2d 297 (1995). "'Any intentional and unprivileged entry on land is a trespass without a showing of damage, since those who own land have an exclusive right to its use.'" *Adkins v Thomas Solvent Co*, 440 Mich 293, 304; 487 NW2d 715 (1992), quoting Prosser & Keeton, Torts (5th ed), § 87, p 623.

After carefully reviewing plaintiffs' amended complaints, we conclude that plaintiffs successfully alleged that they had ownership interests in the invaded properties. Plaintiffs also arguably alleged that they suffered an unauthorized direct or immediate intrusion when they averred that the city's negligence proximately caused the flooding of their basements with sewage and water. *Adams*, *supra* at 71 n 15. But the amended complaints contain no allegations that the city committed any specific act of physical invasion. The closest plaintiffs come to setting forth an act of physical invasion by the city appears within ¶ 14 of the amended complaints, wherein plaintiffs allege that sometime before or on August 6, 1998, "defendant improperly constructed and/or engineered and/or maintained the sewerage system that flooded into plaintiffs' basements." Paragraph fourteen does not explain with specificity any action or conduct by the city that constitutes a direct or immediate physical invasion.[2] See *Churella v Pioneer State Mutual Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003) (explaining that conclusory statements, unsupported by factual allegations, are insufficient to state a cause of action). While ¶ 17 asserts that the city accumulated water and sewage, and ¶ 18 states that the sewage and water invaded plaintiffs' properties, neither paragraph alleges any act by the city that amounted to a direct or immediate physical invasion.

Even assuming that conclusory ¶¶ 14 and 15 adequately state some action by the city that directly or immediately invaded plaintiffs' properties, the amended complaints contain no allegations that the city intended to perform any specific action that caused the physical invasions. *Buskirk*, *supra* at 392. The amended complaints' only mention of the city's intent appears within ¶ 17, which avers that the city "intentionally caused the accumulation of water and sewage" by operating its sewer system, but this paragraph does not assert that the city intentionally committed any act that caused the physical invasion.[3] Consequently, plaintiffs did

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[2] Plaintiffs restated this nonspecific allegation within ¶ 15.

[3] We reject plaintiffs' suggestion that "[a]s to a trespass condition, it is not necessary for someone to show that the governmental agency intended to intrude upon the private property of the individual." Plaintiff relies on *CS&P*, *supra* at 141. In *CS&P*, after listing the three elements of a trespass-nuisance claim, this Court observed that the "trespass-nuisance doctrine applies only to state and local governments." *Id*. at 145, citing *Cloverleaf Car Co*, *supra* at 193. This Court inserted a footnote in which it observed:

> A person who is not a governmental agency must intend to intrude upon the private property of another in order to be liable under a trespass theory. *Cloverleaf*, *supra* at 195. A private actor is not liable for a negligent intrusion onto the property of another. *Id*.

(continued…)

not sufficiently plead the existence of a trespass by the city in support of the first element of a trespass-nuisance cause of action. *Hadfield*, *supra* at 169.

With respect to the drain commissioner, the defendant-appellee in Docket No. 247703, we observe that an identical analysis applies. The Jacobsons and Nigams asserted that the drain commissioner had an easement "through plaintiffs' properties for th[e Pittsfield-Ann Arbor Drain,]" and that on August 6, 1998 and June 25, 2000, "sewage from the city's sanitary sewerage and water from the county drain flooded into the basements of the plaintiffs." The remaining general allegations and paragraphs of Count I are copied verbatim from the other plaintiffs' amended complaints, with the slight modification of references to water from the drain pipe and the drain commissioner as an additional defendant. Because the Jacobsons and Nigams set forth substantive allegations concerning the drain commissioner identical to those alleged against the city, they failed to sufficiently allege that the commissioner committed a trespass.[4]

Plaintiffs also could state a claim with respect to the first element of trespass-nuisance if their amended complaints adequately set forth the existence of a nuisance. The Michigan Supreme Court has described the following components of a private nuisance:

> According to the Restatement, an actor is subject to liability for private nuisance for a nontrepassory invasion of another's interest in the private use and enjoyment of land if (a) the other has property rights and privileges in respect to the use or enjoyment interfered with, (b) the invasion results in significant harm[,] (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (i) intentional and unreasonable, or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or

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(…continued)

This Court in *CS&P* did not expressly purport to hold that a governmental entity may be liable for an act of trespass, despite that the entity engaged in no intentional action. This Court did not reach such a conclusion in *Cloverleaf Car Co*, *supra* at 195, which involved an alleged trespass by a private company. Furthermore, the footnote in *CS&P* is nonbinding dicta because the Court in *CS&P* did not have to address the question whether a governmental agency could be reliable for a trespass absent its intentional act. *Carr v City of Lansing*, 259 Mich App 376, 383-384; 674 NW2d 168 (2003). Plaintiffs direct us to no other authority for the proposition that a governmental entity need not have committed an intentional act to be liable in trespass.

Plaintiffs correctly observe that in a trespass-nuisance action, the plaintiff need not establish that the governmental defendant acted with negligence. *CS&P*, *supra* at 145-146. But this fact does not conflict with the intentional act requirement of a trespass action, as plaintiffs suggest. The intent requirement in a trespass action only contemplates that the trespass must have occurred because of some volitional act by the defendant. *Buskirk*, *supra* at 392 (finding a trespass arising directly and necessarily from "acts intentionally done"). Plaintiffs confuse the separate inquiries (1) whether an act qualifies as intentional or volitional, and (2) with what standard of care the defendant performed the act.

[4] The more abbreviated original complaints likewise did not contain within Count I any allegation of a specific act of physical invasion by defendants, and no allegation regarding either defendant's intent to perform a specific action that resulted in physical invasion.

> ultrahazardous conduct. [*Adkins*, *supra* at 304, citing 4 Restatement Torts, 2d, §§ 821D-F, 822, pp 100-115.]

See also *Cloverleaf Car Co*, *supra* at 193, quoting *Adkins*, *supra* at 304.

The amended complaints establish that plaintiffs have rights in their respective properties. Several paragraphs of the amended complaints may be interpreted as alleging that the flooding of plaintiffs' properties resulted in significant harm: ¶¶ 9-10 state that the flood waters included "feces, dirt, debris, [and] noxious odors"; ¶ 26 alleges that the flooding caused "damages as alleged below"; and ¶ 36 includes in the list of plaintiffs' damages personal and real property destruction, diminution in property values, health impairment, "[l]oss of the normal use and enjoyment of their property," and "mental stress and emotional anguish." But the amended complaints do not describe any specific conduct by the city that amounted to the legal cause of the basement flooding. As discussed above, ¶¶ 14 and 15 assert that before or on August 6, 1998, the city "improperly constructed and/or engineered and/or maintained the sewerage system from which came the intrusions that flooded into plaintiffs' basements," and that the "negligence in constructing and/or engineering and/or designing and/or maintaining the sewerage system" proximately caused the flooding. These allegations do not supply any example of a specific act by the city that led to the flooding. *Churella*, *supra* at 272. Paragraph seventeen avers that the city accumulated water and sewage, but not that the city did anything with these to cause the flooding. The only other potentially relevant paragraph in the amended complaint is ¶ 23, which alleges the following:

> By causing water and sewage accumulations in its sewerage system to physically intrude into plaintiffs' homes, defendant unreasonably interfered with the use and enjoyment by plaintiffs of their properties.

Once again, this paragraph conclusorily maintains that the city caused the flooding, without explaining with any specificity what actions by the city comprised the cause. *Churella*, *supra*.

Even assuming that plaintiffs sufficiently set forth conduct by the city that caused the invasions of water and sewage, the amended complaints do not allege that "the invasion is either (i) intentional and unreasonable, or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct." *Adkins*, *supra* at 304. The amended complaints characterize the flooding as an unreasonable interference with "plaintiffs' use and enjoyment of . . . their properties," but, as discussed above, nowhere allege that the city committed an intentional invasion. Although the amended complaints make a general allegation of the city's negligence within ¶¶ 14-15, Count I of the complaints does not adequately assert that the invasion by the city qualified as "unintentional *and* otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct" (emphasis added). *Churella*, *supra*.

Because plaintiffs do not allege the necessary nuisance elements that the city took a specific action to legally cause the invasion, or that the invasion occurred intentionally and

unreasonably or was unintentional and otherwise actionable, we conclude that plaintiffs failed to state a claim regarding nuisance in support of the first element of a trespass-nuisance claim. Pursuant to the same logic, the substantively identical allegations of the Jacobsons and Nigams against the drain commissioner likewise do not sufficiently establish a nuisance.[5] Because plaintiffs failed to allege against either the city or the drain commissioner its commission of a trespass or nuisance, we conclude that the circuit court properly granted defendants' motions for summary disposition of plaintiffs' amended trespass-nuisance counts pursuant to MCR 2.116(C)(8).

II

Plaintiffs next argue that the circuit court should have permitted them to further amend their amended complaints to state a claim of trespass-nuisance. "[D]ecisions granting or denying motions to amend pleadings . . . are within the sound discretion of the trial court and reversal is only appropriate when the trial court abuses that discretion." *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997).

The Michigan Court Rules govern the amendment of pleadings. Relevant to this case, in which the circuit court granted summary disposition of plaintiffs' amended complaints pursuant to MCR 2.116(C)(8), the court rules provide as follows:

> If the grounds asserted are based on subrule (C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified. [MCR 2.116(I)(5).]

MCR 2.118(A)(2) provides:

> Except as provided in subrule (A)(1),[6] a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires.

Michigan courts have interpreted subrule (A)(2) as ordinarily providing a party the opportunity to amend his pleading, and have reasoned that a court should deny the opportunity to amend only for the following reasons: (1) undue delay by the moving party; (2) the moving party's dilatory motive or bad faith in seeking amendment; (3) the moving party's "'repeated failures to cure deficiencies by amendments previously allowed'"; (4) the granting of the motion to amend would cause the opposing party undue prejudice; and (5) futility of the proposed amendment.

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[5] The original complaints also failed to describe any specific conduct by either defendant that constitutes the legal cause of the basement flooding, or that the invasions qualified as either intentional and unreasonable or unintentional and otherwise actionable.

[6] Subrule (A)(1) vests a party with the right to "amend a pleading once as a matter of course within 14 days after being served with a responsive pleading . . . or within 14 days after serving the pleading if it does not require a responsive pleading."

Weymers, *supra* at 658-659, quoting *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973). "The trial court must specify its reasons for denying the motion; failure to do so requires reversal unless the amendment would be futile." *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 75; 592 NW2d 724 (1998). An amendment qualifies as futile when "it merely restates the allegations already made or adds allegations that still fail to state a claim." *Lane v Kindercare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998).

We affirm the circuit court's denial of plaintiffs' requests for leave to further amend their amended complaints because they did not comply with the court rules, specifically MCR 2.118(A)(4), which contains the following requirement:

> *Amendments must be filed in writing*, dated, and numbered consecutively, and must comply with MCR 2.113. Unless otherwise indicated, an amended pleading supersedes the former pleading. [Emphasis added.]

Neither in response to the city's and drain commissioner's renewed motions for summary disposition, nor thereafter, did plaintiffs present to the circuit court, in writing or otherwise, the substance of any further proposed amendments. Plaintiffs simply added their one-sentence request for leave to amend at the conclusion of their responses to the city's renewed motion for summary disposition. This Court has held that a trial court does not abuse its discretion by denying a request to amend when the plaintiff has failed to comply with the written amendment requirement of MCR 2.118(A)(4). *Lown v JJ Eaton Place*, 235 Mich App 721, 726; 598 NW2d 633 (1999); *Burse v Wayne Co Medical Examiner*, 151 Mich App 761, 768; 391 NW2d 479 (1986). Furthermore, plaintiffs neglect to substantiate within the record the content of the amended pleadings they desire to file, thus precluding this Court from addressing the merits of their amendment argument. See *Burse*, *supra*.

Accordingly, although the circuit court relied on the ground of futility, we uphold the court's denial of plaintiffs' requests for leave to again amend Count I of their amended complaints because of their failures to comply with the court rules. *Lane*, *supra* at 697 (explaining that this Court will not reverse where the trial court reached the correct result for the wrong reason).

III

Plaintiffs further maintain that the circuit court erred in dismissing their unconstitutional taking claims pursuant to MCR 2.116(C)(8). We again review de novo the circuit court's summary disposition ruling. *Maiden*, *supra* at 118-120.

The Michigan Constitution contemplates that the government may exercise the power of eminent domain to acquire private property for a public use. Const 1963, art 10, § 2. Additionally, "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." *Peterman v Dep't of Natural Resources*, 446 Mich 177, 187-188; 521 NW2d 499 (1994). "'Taking' is a term of art with respect to the constitutional right to just compensation and does not necessarily mean the actual and total conversion of the property." *Hart v Detroit*, 416 Mich 488, 500; 331 NW2d 438 (1982). "Under Michigan law, a 'taking' for purposes of inverse condemnation means that the governmental

action has permanently deprived the property owner of any possession or use of the property." *Spiek v Dep't of Transportation*, 456 Mich 331, 334 n 3; 572 NW2d 201 (1998) (citation omitted); *Charles Murphy, MD, PC v Detroit*, 201 Mich App 54, 56; 506 NW2d 5 (1993). "Whether a 'taking' occurs for which compensation is due depends on the facts and circumstances of each case." *Hart, supra* at 500.

"Since no exact formula exists concerning a de facto taking, the form, intensity, and the deliberateness of the governmental actions toward the injured party's property must be examined." *In re Acquisition of Land—Virginia Park*, 121 Mich App 153, 160; 328 NW2d 602 (1982); *Heinrich v Detroit*, 90 Mich App 692, 698; 282 NW2d 448 (1979). A governmental entity's actions might amount to a taking of private property despite that the agency never directly exercised control over the property, provided that some action by the government constitutes a direct disturbance of or interference with property rights. *In re Acquisition of Land, supra* at 159. For example, "[t]h[e Michigan Supreme] Court has applied the constitutional restriction to a variety of takings; for example, *to situations of trespass from flooding waters escaping from artificial reservoirs, Ashley v Port Huron*, 35 Mich 296 (1877); *Herro v Chippewa Co Rd Comm'rs*, 368 Mich 263[; 118 NW2d 271] (1962)." *Buckeye Union Fire Ins Co v Michigan*, 383 Mich 630, 642; 178 NW2d 476 (1970) (emphasis added).

Generally, "[w]hether there is a taking depends on the character of the invasion, not the amount of damage resulting, as long as it is substantial. Compensation cannot be recovered for an interference with property rights which is not substantial in nature." 29A CJS, Eminent Domain, § 82(a), p 228.

> "The constitutional provision is adopted for the protection of and security to the rights of the individual as against the government," and the term "taking should not be used in an unreasonable or narrow sense. It should not be limited to the absolute conversion of property, and applied to land only; but it should include cases where *the value is destroyed by the action of the government*, or *serious injury is inflicted to the property itself*, or *exclusion of the owner from its enjoyment, or from any of the appurtenances thereto*. In either of these cases it is a taking within the meaning of the provision of the constitution. "A partial destruction or diminution is a taking." Mills, Em Dom § 30; *Pumpelly v Green Bay* [*& Mississippi Canal Co*, 80 US 166; 20 L Ed 557 (1871)]; *Cushman v Smith*, 34 Me 247 [(1852)]; *Grand Rapids* [*Booming*] *Co v Jarvis*, 30 Mich 308 [(1874)]. [*Pearsall v Eaton Co Bd of Supervisors*, 74 Mich 558, 561-562; 42 NW 77 (1889) (emphasis added).]

See also *In re Acquisition of Land, supra* at 160.

With respect to the nature of the government's act of invasion, this Court has held that to afford the basis for a taking, the government must have "'abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property.'" *Hinojosa v Dep't of Natural Resources*, ___ Mich App ___; ___ NW2d ___ (Docket No. 248185, issued September 9, 2004),

slip op at 7,[7] quoting *Heinrich*, *supra* at 700; see also *In re Acquisition of Land*, *supra* at 161. Furthermore, the plaintiff in an inverse condemnation action bears the burden of establishing that the government's conduct proximately caused an invasion and destruction of his private property rights. *Peterman*, *supra* at 190-191; *Hinojosa*, *supra*, slip op at 7; *Heinrich*, *supra* at 699-700. The plaintiff must satisfy this burden by proving "'that the government's actions were a *substantial* cause of the decline of his property's value.'" *Hinojosa*, *supra*, slip op at 7, quoting *Heinrich*, *supra* at 700 (emphasis in original).

These cases suggest that under the Michigan Constitution a taking claim requires a showing that (1) a direct invasion of the plaintiff's private property occurred, (2) the invasion permanently infringed on some property right of the plaintiff, (3) the infringement qualified as substantial, in other words that it destroyed the value of the property, inflicted serious injury to the property, or excluded the plaintiff from his enjoyment of the property or its appurtenances, (4) the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property, and (5) some act of the government amounted to a proximate or substantial cause of the infringement.

Here, the circuit court granted summary disposition of the inverse condemnation/unlawful taking claims within the first group of complaints that plaintiffs filed in October and November 2000, pursuant to MCR 2.116(C)(8). The court did not evaluate at length the unlawful taking claims that plaintiffs filed within their April 2002 amended complaints, but simply dismissed these counts on the basis of futility.

We conclude that the circuit court properly granted defendants summary disposition of the unconstitutional taking claims contained within Count II of the initial complaints filed in October and November 2000. Paragraphs fifteen and sixteen of the original complaints sufficiently asserted that contaminants and water directly invaded plaintiffs' properties. But the original complaints fail to allege the existence of any permanent infringement. Furthermore, nowhere within Count II of the original complaints do plaintiffs set forth any abuse by the government of its legitimate powers in affirmative actions directly aimed at plaintiffs' properties, or any specific governmental act that proximately or substantially caused the infringement on their properties; ¶ 15 only generally alleges that defendants' "activities in and connected to the sewers and drain resulted in releases of water and contaminants which was transported into plaintiffs' homes."[8]

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[7] In the recent decision in *Hinojosa*, this Court upheld the trial court's grant of summary disposition of an unconstitutional taking claim against the state pursuant to MCR 2.116(C)(8) because the plaintiffs failed to allege that the state abused its authority via an affirmative action directed toward the plaintiffs' property; plaintiffs merely alleged "at most" that the state had failed to abate an alleged nuisance. *Id*. at 1-2, 6-8.

[8] To the extent that the original complaints cited in support of Count II the Fifth Amendment to the United States Constitution, our Supreme Court has observed that "[b]oth the Michigan and federal constitutions prohibit the taking of private property for public use without just compensation," and that the "Taking Clause of the state constitution is substantially similar to

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Although the circuit court did not analyze in detail Count II within plaintiffs' amended complaints, the court properly granted summary disposition of these counts according to MCR 2.116(C)(8). The amended complaints set forth a direct physical invasion of plaintiffs' properties within ¶¶ 29 and 30, which maintain that water and sewage from the city's sewer system (as well as the county drain) "physically invaded and settled upon plaintiffs' lands and properties," and that defendants "specifically directed . . . water and sewage to these plaintiffs' properties." Paragraphs thirty-one and thirty-two of the amended complaints allege that the invasion permanently infringed on plaintiffs' property rights: the "physical invasions of plaintiffs' lands and properties by water and sewage unjustifiably and unlawfully interfered with . . . and permanently deprived plaintiffs of their exclusive right to utilize their lands" as private residences (¶ 31), and defendants' acts "constitute permanent takings of part of private property" (¶ 32). The amended complaints also appear to assert a substantial infringement of plaintiffs' property rights within ¶ 35, which avers that "[a]s a result of these takings plaintiffs have sustained damages to their lands and properties as alleged below," and ¶ 36, which complains that plaintiffs' endured "[p]hysical damages to their real property," "[d]iminution in the value of their property," and "[l]oss of the normal us [sic] and enjoyment of their property."

But the unconstitutional taking counts within the amended complaints fail to allege or describe any specific act of defendants that proximately or substantially caused plaintiffs' injuries. Paragraph twenty-seven of amended Count II reasserted and "incorporated into this count" the first twenty-six paragraphs of the amended complaints. Of the earlier paragraphs, the following contain allegations relevant to the question of proximate cause by defendants:

> 14. On or before August 6th, 1998 defendant[s] improperly constructed and/or engineered and/or maintained the sewerage system from which came the intrusions that flooded into plaintiffs' basements.
>
> 15. As a proximate result of . . . defendant[s'] negligence in constructing and/or engineering and/or designing and/or maintaining the sewerage system [and the county drain] the plaintiffs' basements were on the dates stated above flooded with water and sewage.

These paragraphs generally allege that defendants proximately caused the intrusions onto plaintiffs' properties, but do not identify with specificity any conduct by the city or drain commissioner that proximately or substantially resulted in the infringements. Because conclusory statements, unsupported by factual allegations, are insufficient to state a cause of action, we conclude that the circuit court likewise correctly dismissed the amended unconstitutional taking counts for failure to state a claim. *Hinojosa, supra*, slip op at 6-8; *Churella*, *supra* at 272.[9]

(…continued)

that of the federal constitution." *Tolksdorf v Griffith*, 464 Mich 1, 2; 626 NW2d 163 (2001). Therefore, our discussion of this issue illustrates that Count II of the original complaints likewise failed to state a claim of unconstitutional taking under the United States Constitution.

[9] Even assuming that plaintiffs stated valid amended unconstitutional taking claims against the (continued…)

IV

Plaintiffs lastly assert that the circuit court erred in denying them an opportunity to amend their unconstitutional taking claims. We conclude that the circuit court properly denied plaintiffs permission to proceed with amended Count II against either defendant because the amended counts qualify as futile. As discussed in part III, *supra*, the allegations within amended Count II still fail to state a claim of unconstitutional taking by the city or drain commissioner. *Lane*, *supra* at 697. Even assuming that amended Count II stated a valid claim of unconstitutional taking, no evidence supported at least two elements of the unconstitutional taking claim, and the circuit court properly could have dismissed the amended count pursuant to MCR 2.116(C)(10). *Id.* (explaining that this Court will not reverse where the trial court reached the correct result for the wrong reason). To the extent that plaintiffs' argument may be construed as an assertion of entitlement to amend Count II a second time, we observe that plaintiffs did not present to the circuit court, in writing or otherwise, the substance of any further proposed amendments to their pleadings, *Lown*, *supra* at 726, and plaintiffs neglect to substantiate within the record the content of any further amended pleadings they desire to file, which precludes this Court from addressing the merits of their amendment argument. See *Burse*, *supra* at 768.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Donald S. Owens
/s/ Karen Fort Hood

(…continued)

city and drain commissioner, the circuit court nonetheless properly could have granted summary disposition of the taking claims pursuant to MCR 2.116(C)(10). After carefully reviewing the voluminous reports, some of which are more than twenty years old, and other documentary evidence that plaintiffs attach to their brief on appeal, we observe no evidence that (1) any plaintiffs experienced a permanent infringement of their private property rights, or (2) either the city or drain commissioner committed any act specifically directed toward plaintiffs' properties that constituted an abuse of its legitimate powers.