STATE OF MICHIGAN

COURT OF APPEALS

ESTATE DEVELOPMENT COMPANY,

Plaintiff-Appellant,

v

OAKLAND COUNTY ROAD COMMISSION,

Defendant/Third-Party Plaintiff-Appellee,

and

THOMPSON-MCCULLY COMPANY, a/k/a THOMPSON-MCCULLY COMPANY, L.L.C.,

Third-Party Defendant/Third-Party Plaintiff-Appellee,

and

OAKLAND EXCAVATING COMPANY, OWEN TREE SERVICE, and ACKLEY CONSTRUCTION,

Third-Party Defendants.

UNPUBLISHED
November 20, 2007

No. 273383
Oakland Circuit Court
LC No. 2004-057182-CC

Before: Servitto, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

In this inverse condemnation action alleging an unconstitutional taking of property, plaintiff appeals by leave granted from an order granting summary disposition in favor of defendant Oakland County Road Commission, pursuant to MCR 2.116(C)(10). We reverse and remand.

This Court reviews de novo a circuit court's decision with regard to a motion for summary disposition. *Trost v Buckstop Lure Co*, 249 Mich App 580, 583; 644 NW2d 54 (2002). In reviewing a motion under MCR 2.116(C)(10), this Court "must consider the available pleadings, affidavits, depositions, and other documentary evidence in a light most favorable to

the nonmoving party and determine whether the moving party was entitled to judgment as a matter of law." *Unisys Corp v Comm'r of Ins*, 236 Mich App 686, 689; 601 NW2d 155 (1999).

This Court recently summarized the law regarding unconstitutional takings in *Heydon v Mediaone of Southeast Michigan, Inc*, 275 Mich App 267, 279-280; ___ NW2d ___ (2007):

> The federal and state constitutions both proscribe the taking of private property for public use without just compensation. US Const, Am V; Const 1963, art 10, § 2; *Adams Outdoor Advertising v East Lansing (After Remand)*, 463 Mich 17, 23; 614 NW2d 634 (2000); *Oakland Co Bd of Co Rd Comm'rs v JBD Rochester, LLC*, 271 Mich App 113, 114; 718 NW2d 845 (2006). The purpose of just compensation is to put property owners in as good a position as they would have been had their property not been taken from them. *Poirier v Grand Blanc Twp (After Remand)*, 192 Mich App 539, 543; 481 NW2d 762 (1992).
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> " '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. Whether a 'taking' occurs for which compensation is due depends on the facts and circumstances of each case." *Hart v Detroit*, 416 Mich 488, 500; 331 NW2d 438 (1982). A governmental entity's actions might amount to a taking of private property even though 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—Virginia Park*, 121 Mich App 153, 159; 328 NW2d 602 (1982).

"What governmental action constitutes a 'taking' is not narrowly construed, nor does it require an actual physical invasion of the property." *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 548; 688 NW2d 550 (2004); see also *Peterman v Dep't of Natural Resources*, 446 Mich 177, 189; 521 NW2d 499 (1994).

Initially, we conclude that the trial court erred in determining that plaintiff could not establish an unconstitutional taking claim because it did not have a vested right to develop the property in the manner it desired, given that it never obtained final approval for its development plans.

One who asserts a taking claim must first establish that a vested property right is affected. *In re Certified Question (Fun 'N Sun RV, Inc v Michigan)*, 447 Mich 765, 787-788; 527 NW2d 468 (1994). To constitute a vested right, the interest must be something more than such a mere expectation. *Id*.

In this case, regardless whether plaintiff is able to develop the property in a particular manner, plaintiff is the undisputed owner of the affected property. Property owners have the right to complete possession and enjoyment of their land and to not have their property flooded with water. *Peterman, supra* at 189 and n 16. As the Court observed in *Peterman*:

> [A]ny injury to the property of an individual which deprives the owner of the ordinary use of it is equivalent to a taking, and entitles him to compensation. So a partial destruction or diminution of value of property by an act of

> government, which directly and not merely incidentally affects it, is to that extent an appropriation. [*Id.* at 190, quoting *Vanderlip v Grand Rapids*, 73 Mich 522, 534; 41 NW 677 (1889) (citation and internal quotations omitted).]

Thus, plaintiff's claim that its property was flooded is sufficient to establish that its vested property rights were affected.

We also conclude that the trial court erred in determining that there was no genuine issue of material fact with regard to whether defendant's actions were a substantial cause of the flooding on plaintiff's property.

To constitute a taking, the government need not directly invade the plaintiff's land; causation may be established where it set into motion the destructive forces that caused the damage to the plaintiff's property. *Peterman, supra* at 191.

Plaintiff relied on circumstantial evidence to prove causation. In *Skinner v Square D Co*, 445 Mich 153, 164-165, 166-167; 516 NW2d 475 (1994), the Court explained what is sufficient circumstantial proof of causation:

> To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation. In *Kaminski v Grand Trunk W R Co*, 347 Mich 417, 422; 79 NW2d 899 (1956), this Court highlighted the basic legal distinction between a reasonable inference and impermissible conjecture with regard to causal proof:
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> "As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only. On the other hand, if there is evidence which points to any 1 theory of causation, indicating a logical sequence of cause and effect, then there is a juridical basis for such a determination, notwithstanding the existence of other plausible theories with or without support in the evidence."
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> We want to make clear what it means to provide circumstantial evidence that permits a reasonable inference of causation. As *Kaminski* explains, at a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred.
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> * * *
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> [W]e concur with the observation made in 57A Am Jur 2d, Negligence, § 461, p 442:

> All that is necessary is that the proof amount to a reasonable likelihood of probability rather than a possibility. The evidence need not negate all other possible causes, but such evidence must exclude other reasonable hypotheses with a fair amount of certainty. Absolute certainty cannot be achieved in proving negligence circumstantially; but such proof may satisfy where the chain of circumstances leads to a conclusion which is more probable than any other hypothesis reflected by the evidence. However, if such evidence lends equal support to inconsistent conclusions or is equally consistent with contradictory hypotheses, negligence is not established.

In this case, viewed in a light most favorable to plaintiff, the evidence provided a reliable basis from which reasonable minds could infer that more probably than not, defendant's construction activities set into motion the forces that caused the flooding of plaintiff's property. Plaintiff presented evidence that a culvert acted as an outlet for Mirror Lake, controlling the lake level at 955.55 feet above sea level. Shortly after defendant began cutting trees and brush in the area of the culvert, debris and vegetation were found that blocked the drain leading to the culvert, and a wetlands assessment revealed that the water level had moved upland. Moreover, plaintiff presented evidence that defendant's replacement culvert was blocked during the road construction project due to improper installation of the pipe, and that Mirror Lake continued to rise during this period. Joseph Rokicsak, a wetlands surveyor who investigated Mirror Lake, opined that the lake had grown in size because of restricted outflow and observed that debris and vegetation blocked the drain leaving the lake. Although defendant presented evidence suggesting that a blockage occurred before the road construction project began, plaintiff's evidence was sufficient to create an issue of fact whether defendant's activities caused the flooding to plaintiff's property.

To establish a de facto taking claim, plaintiff is also required to show causation. This may be established by showing that defendant abused its legitimate powers through affirmative actions directly aimed at plaintiff's property. *Hinojosa, supra* at 548; *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 130; 680 NW2d 485 (2004).

In *Peterman,* the Court held that the government's action in constructing a boat launch and installing jetties, which resulted in the diminishment of the plaintiffs' fast land, was sufficient to establish a taking. *Peterman, supra* at 200, 207-208. Although the government did not directly invade the plaintiffs' land, it set into motion the destructive forces that caused the erosion and eventual destruction of the plaintiffs' property. *Id*. at 191. The Court rejected the government's argument that it need not compensate the plaintiffs because its actions were within its legitimate power to improve navigation of the state's waterways. *Id.* The Court concluded that "simply because the state is acting to improve navigation does not grant it the power to condemn all property without compensation." *Id*. at 198.

We believe that *Peterman* controls the disposition of this case. As in *Peterman*, plaintiff presented evidence that defendant set in force destructive forces that caused flooding to plaintiff's land. Contrary to what defendant argues, this case does not involve a situation where damage resulted because of an alleged omission by the government. See *Hinojosa, supra*. Rather, the basis for plaintiff's taking claim is that defendant engaged in affirmative acts in the exercise of its road construction activities that, while not directly invading plaintiff's land, set into motion the destructive forces that caused the flooding to plaintiff's property.

For these reasons, the trial court erred in granting defendant's motion for summary disposition.

Reversed and remanded. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ David H. Sawyer
/s/ Christopher M. Murray