# STATE OF MICHIGAN

# COURT OF APPEALS

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JEANNE JONES, JAMES JONES, ROGER TROST, CAROL TROST, MIKE ROBERT, MIKE BARTHLOW, CINDY BARTHLOW, SUSAN BROWN, KENNETH BROWN, SHIRLEY BRYANT, DAVID BURHANS, WILLIAM CHUNN, IVAN GADJEV, FLORENCE GADJEV, REX GLASSON, BARBARA GLASSON, KEVIN HALL, SONIA HALL, WILLIAM HATTON, ELIZABETH HATTON, BILL HOFSESS, JOAN HOFSESS, JAMES HUBBLE, VIRGINIA HUBBLE, MARY PEGORARO, PHIL PEGORARO, MICHAEL ALLEN PETERS and TODD SNIDER,

Plaintiffs-Appellants,

and

MAGDALENA CHAVEZ, LON HAMILTON, DIANNE HAMILTON, SOUREN KEOLEIAN, MAYNARD MARIN, ANGELO MERUCCI, ENERA MERUCCI, MIGUEL PRIETO, JILL PRIETO and BETTY ZAHER,

Plaintiffs,

v

CITY OF FARMINGTON HILLS and FARMINGTON HILLS REPRESENTATIVES,

Defendants-Appellees.

UNPUBLISHED
October 26, 2004

No. 247506
Oakland Circuit Court
LC No. 98-008498-NZ

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

PER CURIAM.

Plaintiffs, residents of defendant city of Farmington Hills,[1] filed this action alleging trespass-nuisance and an unconstitutional taking by defendant on the basis that in August 1998, its municipal sewer system discharged water and raw sewage onto their properties. Plaintiffs-appellants appeal as of right from an order that granted defendant's motions for summary disposition of their claims. We affirm.

I

This case has a lengthy procedural history. Several plaintiffs commenced this action in August 1998.[2] In March 2000, the parties filed cross-motions for summary disposition with respect to defendant's liability for trespass-nuisance. In May 2000, the circuit court granted plaintiffs' motion and denied defendant's motion regarding liability for trespass-nuisance pursuant to MCR 2.116(C)(10). Defendant filed an interlocutory application for leave to appeal in this Court in Docket No. 227657, which this Court denied on September 29, 2000.

Defendant subsequently filed an application for leave to appeal to our Supreme Court, which granted the application and consolidated the appeal with *Pohutski v City of Allen Park* (Docket No. 116949). *Jones v City of Farmington Hills*, 463 Mich 968 (2001). On April 2, 2002, the Supreme Court decided *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002), and the companion case of *Jones v City of Farmington Hills*.

In *Pohutski*, the Supreme Court held that "the plain language of the governmental tort liability act does not contain a trespass-nuisance exception to governmental immunity," overruling *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139; 422 NW2d 205 (1988), and its progeny. *Pohutski*, *supra* at 684-690, 695, 699. In light of the fact that the *Pohutski* decision was "akin to the announcement of a new rule of law," the Supreme Court concluded that its ruling would apply only prospectively. *Id*. at 695-699. The Court explained that "[i]n all cases currently pending, the interpretation set forth in *Hadfield* will apply." *Id*. at 699. The Court lastly noted as follows concerning this case:

> Finally, we observe that it appears from the record that the circuit courts may not have addressed all the elements required under *Hadfield* for a claim of trespass-nuisance, including causation, when deciding the motions for summary disposition. Therefore, we remand these cases to the circuit courts to reconsider plaintiffs' motions for summary disposition under *Hadfield*, including the issue of causation. See *Hadfield*, *supra* at 169; *Peterman v Dep't of Natural Resources*, 446 Mich 177, 205, n 42; 521 NW2d 499 (1994). [*Pohutski*, *supra* at 700.]

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[1] Because the individual defendant representatives of the city of Farmington Hills are unspecified and unnamed employees or agents of the city, we utilize the singular term "defendant" to refer solely to the appellee city.

[2] Plaintiffs' complaint, and the first amended complaint that added several plaintiffs, contained several counts not at issue in this appeal, including trespass, nuisance, negligence, and gross negligence by defendant's employees.

Plaintiffs filed a motion for rehearing of the Supreme Court's decision, which the Court denied. *Jones v City of Farmington Hills*, 466 Mich 1208; 645 NW2d 658 (2002).

In November 2002, defendant filed its second motion for summary disposition of plaintiffs' trespass-nuisance claim, together with a motion for summary disposition of the unconstitutional taking count. The circuit court granted defendant's motions pursuant to MCR 2.116(C)(10).

II

Plaintiffs first contend that the circuit court erred in granting defendant's motion for summary disposition of their trespass-nuisance claim on the basis that defendant did not cause or control the August 1998 sewer system surcharge. We review de novo a circuit court's summary disposition ruling. *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In reviewing a motion under subrule (C)(10), this Court considers de novo, and in the light most favorable to the nonmoving party, all pleadings, admissions, affidavits, and other relevant documentary evidence of record to determine whether any genuine issue of material fact exists to warrant a trial. *Spiek, supra* at 337.

Because this case arose before the Supreme Court's April 2, 2002, decision in *Pohutski*, *supra* at 675, this Court must apply the limited trespass-nuisance exception to governmental immunity delineated by the Supreme Court in *Hadfield*, *supra* at 139. In remanding the instant case to the circuit court, the Supreme Court specifically directed the court's attention to the trespass-nuisance description found in *Hadfield*, *supra* at 169, which provides, in relevant part, as follows:

> 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). [*Pohutski*, *supra* at 700 (emphasis added).]

In addition to the above-quoted passage from *Hadfield*, the Supreme Court in *Pohutski*, *supra* at 700, also cited as relevant to the elements of a trespass-nuisance claim *Peterman*, *supra* at 205 n 42. In addressing the plaintiff's trespass-nuisance claim, the Supreme Court in *Peterman*, *id*. at 205, quoted the trespass-nuisance definition from *Hadfield*, *supra* at 169, which the Court then further clarified in a footnote as follows:

> While a governmental entity *must have been a proximate cause of the injury*, "the source of the intrusion" need not originate from "government-owned land." Moreover, "[n]egligence is not a necessary element of this cause of action." This is true even if an instrumentality causing the trespass-nuisance was "built with all due care, and in strict conformity to the plan adopted by" a

> governmental agency or department. [*Peterman*, *supra* at 205 n 42 (emphasis added; citations omitted).]

These discussions of trespass-nuisance, together with the Supreme Court's explicit admonition to the circuit court that it had to consider on remand "the issue of causation," plainly reflect the requirement that for a governmental defendant to face liability for a physical intrusion onto a plaintiff's property, the plaintiff must present evidence that the governmental entity engaged in some act or omission that proximately caused the physical intrusion. *Pohutski*, *supra* at 700. This requirement is embodied within the description in *Hadfield*, *supra* at 169, that the governmental defendant must have *set in motion* the physical intrusion.

Plaintiffs suggest that the above-quoted language from *Peterman*, *supra* at 205 n 42, together with this Court's decision in *CS&P, Inc v City of Midland*, 229 Mich App 141, 144-146; 580 NW2d 468 (1998), signal that trespass-nuisance is a strict liability tort in support of which a plaintiff need not show causation or negligence. Plaintiffs confuse the question of negligence or standard of care with the issue of proximate causation. In light of the "set in motion" and "proximate cause" language of *Hadfield* and *Peterman*, a plaintiff alleging trespass-nuisance plainly must demonstrate that the government took some action or made some omission that qualifies as a legal cause of a physical invasion. The fact that a plaintiff need not show negligence by the government does not relieve the plaintiff of proving causation, but simply signifies that the plaintiff need not demonstrate that the act of proximate cause by the government occurred with a specific standard of care.[3]

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[3] This distinction appears recognized within *CS&P*, *supra* at 142-143, which this Court decided on the basis of the following facts:

> *According to the undisputed testimony*, water and sewage emanating from the toilets and floor drains invaded the premises of a commercial building located in Midland and owned by LBL Investments. Both CS&P and 3-S Construction occupied suites in the lower level of the building. The flooding caused extensive damage to the building and its contents. The tenants could not occupy the lower portion of the building for several weeks. . . . *Broken risers in the sewer on a street adjacent to the building caused a blockage, and diverted the water and sewage into the building*. Midland admitted that it owned the sewer system, that it was responsible for maintaining, installing, and repairing sanitary sewers, and that the section of the sewer that failed had been cleaned and inspected, no problems having been found. [Emphasis added.]

In *CS&P*, this Court affirmed the trial court's conclusion that in light of these facts, the plaintiffs did not have to additionally prove any negligence by the defendant to establish a trespass-nuisance. *Id*. at 144, 146. Contrary to the instant plaintiffs' suggestion, this Court did not disregard the requirement of proximate causation. This Court quoted *Hadfield*, *supra* at 169, for the proposition that a trespass-nuisance constitutes a "'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.'" *CS&P*, *supra* at 145 (emphasis added).
(continued…)

In spite of the Supreme Court's and this Court's explicit recognitions of a proximate causation requirement in a trespass-nuisance action, and the Supreme Court's specific direction to the circuit court to apply the causation element in this case, *Pohutski, supra* at 700, plaintiffs further seek to avoid the causation element by insisting that they need establish only government causation *or control*. In *Hadfield, supra* at 169, the Supreme Court did summarize the elements of a trespass-nuisance claim as "condition (nuisance or trespass); cause (physical intrusion); and *causation or control* (by government)." [Emphasis added.] But the option of showing government control does not entirely relieve a trespass-nuisance plaintiff from his obligation to establish that an instrumentality controlled by the government proximately caused a physical invasion of the plaintiff's property. In applying the causation or control element to one of the four consolidated appeals in *Hadfield*, the Supreme Court described the control element as examining the "defendant's control *over the creation of the nuisance*." *Id*. at 203 (emphasis added). Other courts have recognized that in the context of a trespass-nuisance action, "control" "may be found where the defendant creates the nuisance, *owns or controls the property from which the nuisance arose*, or employs another to do work that he knows is likely to create a nuisance." *Continental Paper & Supply Co, Inc v Detroit*, 451 Mich 162, 165 n 7; 545 NW2d 657 (1996) (emphasis added), quoting *Baker v Waste Mgmt of Michigan, Inc*, 208 Mich App 602, 606; 528 NW2d 835 (1995) (citation omitted). While plaintiffs maintain that the italicized language merely reflects their obligation to show defendant's ownership and control of its municipal sewer system, we observe that the element of "control" requires further that plaintiffs must establish that the nuisance *arose from the property controlled by defendant*.

Establishing "control" by showing that the nuisance arose from the property owned or controlled by the defendant appears akin to the differently phrased requirement that the trespass-nuisance plaintiff prove that the governmental defendant *set in motion* the physical intrusion. Both phrasings contemplate that the plaintiff must establish the link of proximate causation between government property, or an act or omission of the governmental defendant, and the physical invasion of the plaintiff's property. A contrary conclusion that mere ownership and control alone would suffice to impose liability on a governmental defendant would ignore the "set in motion" portion of the trespass-nuisance definition, and the Supreme Court's repeated emphases in *Pohutski, supra* at 700, that the circuit court must consider the element of causation.

In this case, the parties do not appear to dispute that defendant owns and controls a municipal sanitary sewer system. But plaintiffs presented no affidavits, other documentary evidence, or testimony that tended to support their allegations that defendant proximately caused the sewer backups, or had ownership and control over the instrumentality from which the trespass or nuisance arose. Defendant introduced the affidavit of licensed professional engineer Thomas E. Biehl, who was a member of the firm that defendant hired "to investigate homeowners' flooding complaints throughout the community" around August 6, 1998. Biehl

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(…continued)

This Court also quoted the Supreme Court's discussion in *Peterman* that distinguished between the necessary element of proximate causation and the lack of a negligence requirement. *Id*. at 145-146, citing *Peterman, supra* at 205 n 42. In light of the apparently undisputed fact that some action by the defendant city had set in motion the sewer backups, this Court followed the *Peterman* distinction and concluded that the plaintiffs need not additionally show that the defendant city breached a negligence standard of care. *CS&P, supra* at 146.

averred that he had personal and professional knowledge that "[o]n or about August 6, 1998, a rainstorm producing 4.63 inches of water in approximately a six hour period . . . struck the [c]ity of Farmington Hills and the surrounding communities," and that the previous day, another .68 inches of rain had fallen, which could have "significantly inundate[d] the soil profile causing saturated conditions." According to Biehl, the "amount of precipitation from the August 6, 1998 rainfall event, coupled with the pre-existing soil conditions, created 'flooding' throughout the community." Biehl concluded that several different causes existed for the August 6, 1998, basement floodings:

> a. Basement flooding occurred when rainfall caused overland home flooding wherein ponded surface water from rainfall entered homes through windows, doors, doorwalls, and garages; over foundation walls and through cracks in the basement walls and floor;
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> b. Basement flooding occurred from improper grading, drainage ditch, and road and driveway culvert overflow;
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> c. Basement flooding occurred as a result of private sump pump failures, private sump pump capacity limitations, power outages, and improperly placed roof conductor systems and sump pump outlets;
>
> d. Basement flooding occurred as a result of storm sewer system overload due to storm water volume that exceeded the capacity of the storm sewer, which in turn overflowed onto roads, yards and driveways;
>
> e. Basement flooding occurred as a result of *sanitary sewer overload as a result of the unusually large influx of water into the sanitary sewer system or into the County interceptor, due in part to infiltration/inflow from footing drain connections* [*on residences*] *and sump pump/drain systems*. [Emphasis added.]

Biehl opined that "[t]here was no system wide failure of the sanitary or storm sewer system," that he found no "design or construction defect in the municipal sanitary or storm sewer system that caused or contributed to a system wide failure," and that "no known design or construction defect in the municipal sewer system . . . caused consistent flooding throughout the municipality."

A review of Biehl's affidavit indicates that no condition of defendant's sewer system contributed to the basement flooding of August 1998, and that the only involvement of defendant's sewer system in the flooding occurred when the system became overloaded by the excessive or "unusually large" volume of storm water generated by the 4.63 inches of rainfall on the already wet soil. As defendant repeatedly observes, plaintiffs introduced no evidence to contradict Biehl's findings that defendant's sewer system did not contribute to the basement flooding, which instead arose from a rainstorm. Under these circumstances, we conclude that the rainfall, and not defendant's sewer system, set in motion the flooding of plaintiffs' basements, and thus qualifies as the proximate cause of the sewer backups. *Peterman*, *supra* at 205 n 42; *Hadfield*, *supra* at 169; see also *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 496; 668 NW2d 402 (2003) (reciting the definition of proximate cause as "that which, in a natural and continuous sequence, unbroken by new and independent causes, produces the injury"); *Nichols v*

*Dobler*, 253 Mich App 530, 532; 655 NW2d 787 (2002) (explaining that although proximate cause generally involves a factual issue for the trier of fact, the court should decide the question as a matter of law if reasonable minds could not differ regarding the proximate cause of the plaintiff's injury). In other words, although defendant may have owned and controlled the instrumentality through which some of the sewage traveled before entering plaintiffs' basements, no evidence suggests that the sewage nuisance or trespass *arose* from defendant's sewer system. *Continental Paper & Supply*, *supra* at 165 n 7. Consequently, the circuit court properly granted defendant's motion for summary disposition of plaintiffs' trespass-nuisance claim pursuant to MCR 2.116(C)(10).

III

Plaintiffs also argue that the circuit court erred in granting defendant's motion for summary disposition of their unconstitutional taking claim on the basis that no evidence showed that defendant caused the damages to plaintiffs' properties. The Michigan Constitution contemplates that the government may exercise the power of eminent domain to acquire private property for a public use, provided that the government reimburses the property owner with just compensation. 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*, *supra* at 187-188. "'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*, *supra* at 334 n 3 (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. The 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 . . . .*" *Buckeye Union Fire Ins Co v Michigan*, 383 Mich 630, 642; 178 NW2d 476 (1970) (emphasis added; citations omitted).

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." [*Pearsall v Eaton Co Bd of Supervisors*, 74 Mich 558, 561-562; 42 NW 77 (1889) (emphasis added, citations omitted).]

See also *In re Acquisition of Land*, *supra* at 160 (emphasis added), quoting *RJ Widen Co v United States*, 357 F2d 988, 993 (Ct Cl, 1966) (observing that "it has been held consistently that an overflow of water resulting from government construction projects which *materially impairs* the use and enjoyment of lands constitutes a constitutional taking of such lands despite the absence of appropriation of title or occupancy").

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,[4] 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[5] a taking claim requires a showing that (1) a direct invasion of the plaintiff's private property occurred, (2) the invasion

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[4] In its very 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.

[5] Although plaintiffs complain that the circuit court erred in considering the standards for Fifth Amendment takings discussed in federal cases, the Michigan 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 that of the federal constitution." *Tolksdorf v Griffith*, 464 Mich 1, 2; 626 NW2d 163 (2001). Plaintiffs offer no specific authority in support of the proposition that the Michigan Constitution's Taking Clause should be interpreted more broadly than the United States Constitution's Taking Clause. *Tingley v Wardrop*, ___ Mich App ___; ___ NW2d ___ (Docket No. 243171, issued 6/24/04), slip op at 11 (explaining that a party's failure to cite authority in support of an issue waives appellate review of it).

permanently infringed on some property right of the plaintiff,[6] (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. Even assuming that plaintiffs established the first three elements of a taking claim, no evidence suggests that defendant abused its legitimate authority in any action specifically directed at plaintiffs' properties, and, as discussed in part II, *supra*, plaintiffs introduced no evidence to create a genuine issue of material fact that any action of defendant amounted to a substantial cause of the invasion of their properties; the only evidence regarding causation indicates that the incidents of basement flooding were caused by a rainstorm. Consequently, we conclude that the circuit court correctly granted defendant summary disposition of the unconstitutional taking claim pursuant to MCR 2.116(C)(10).[7]

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[6] Plaintiffs inappropriately cite *Herro v Chippewa Co Rd Comm'rs*, 368 Mich 263; 118 NW2d 271 (1962), for the suggestion that a taking may arise from a temporary physical invasion. The Supreme Court in *Herro* did opine that a trespass of water that "was comparatively sudden and (presumably) brought to termination within a short time" could constitute the basis for an unlawful taking claim. *Id*. at 273-274. But *Herro* is distinguishable on its facts, because in that case a large quantity of impounded water broke through a county road and eventually "upended and hurled [a] summer cottage from its foundation into [a] hole or ravine caused by the escaping water," tearing apart the building and killing the plaintiff's decedent. *Id*. at 267. Furthermore, the Supreme Court's discussion of a taking qualifies as dicta because the only claim involved there was one of wrongful death caused by trespass asserted by a visitor to the property at the time of the tragedy. *Id*. at 265. *Carr v City of Lansing*, 259 Mich App 376, 383-384; 674 NW2d 168 (2003) (noting that dictum represents a judicial comment made during the course of delivering a judicial opinion, but that is unnecessary to the decision and therefore not precedential).

[7] While the body of plaintiffs' brief raises the further issue arguing that the circuit court should not have granted summary disposition of the unconstitutional taking claim on the basis of defendant's act of God defense, we decline to consider this issue because plaintiffs failed to include it within their statement of questions presented. *McGoldrick v Holiday Amusements, Inc*, 242 Mich App 286, 298; 618 NW2d 98 (2000). Moreover, plaintiffs' argument lacks merit. "Acts of God" mean "'events and accidents which proceed from natural causes and cannot be anticipated and provided against, such as unprecedented storms, or freshets, lightning, earthquakes, etc.'" *Kaminsky v Hertz Corp*, 94 Mich App 356, 363; 288 NW2d 426 (1979), quoting *Golden & Boter Transfer Co v Brown & Sehler Co*, 209 Mich 503, 510; 177 NW 202 (1920) (quoting the trial court's instructions). An act of God "requires an unusual, extraordinary, and unexpected manifestation of the forces of nature, and require[s] the entire exclusion of human agency from the cause of the injury or loss." *Potter v Battle Creek Gas Co*, 29 Mich App 71, 75; 185 NW2d 37 (1970). In this case, the undisputed evidence indicates that an unusually heavy concentration of rain caused the sewer surcharge, and that defendant did nothing to contribute to the occurrence of the surcharge.

Affirmed.

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