STATE OF MICHIGAN

COURT OF APPEALS

FRANK VANWULFEN, Plaintiff-Appellant and Cross-Appellee,	UNPUBLISHED March 19, 2009
v	No. 281930 Montmorency Circuit Court
MONTMORENCY COUNTY and MONTMORENCY COUNTY DRAIN COMMISSIONER, Defendants-Appellees and Cross-Appellants.	LC No. 04-000950-CC

Before: Donofrio, P.J., and K.F. Kelly and Beckering, JJ.

PER CURIAM.

This inverse condemnation action arises out of plaintiff's contention that defendants' maintenance of higher lake levels between 1997 and 2001 damaged his property. The circuit court entered an order of no cause of action and plaintiff now appeals as of right. We affirm.

I. Facts and Procedural Background

The property at issue is a tract of land on the north shore of Avery Lake located in Montmorency County, Michigan. The VanWulfen family bought a home on the subject property in 1965. The home was originally an outdoor pavilion, but was subsequently converted into a home for year-round living. Before the VanWulfens' purchase, the property had also had a wooden damn built on it, which maintained the lake at a constant level. This wooden dam was replaced with a concrete dam sometime between 1950 and 1952, after which point the lake levels fluctuated. This dam broke in November 1969 and it was replaced with a new dam. However, water came onto the VanWulfens' property in front of the house. Consequently, a seawall was constructed that abutted upon the property's lakeshore. The first winter that the wall was intact, it "didn't last" due to "wind and ice action." The wall was reset sometime during the following spring or summer.

As far back as plaintiff can remember, the county used the damn to lower and raise the lake level, typically lowering the level in the winter and raising it in the summer. The county's authority to adjust and control lake levels derives from the Inland Lake Levels Act (ILLA), MCL 324.30701, et seq. Under these provisions, the county may change the level of an inland lake by

initiating a proceeding in the circuit court upon the motion of the county board or two-thirds of the relevant landowners. MCL 324.30702. After an evidentiary hearing, the court determines the lake level and the county, or other authority, is responsible for maintaining that level. MCL 324.30707; MCL 324.30708.

In 1970, the circuit court, pursuant to the ILLA procedures, entered a judgment indicating that that the lake level should remain at 891.3 feet above sea level during the summer months and be lowered to 890.3 feet above sea level during the winter months. In 1982, the circuit court entered another order indicating that the lake level should be reduced two and a half feet during the winter from the summer level. This practice continued until 1997, when the court entered a judgment determining that the lake level would remain at 890.3 feet above sea level year round. According to plaintiff, before 1997, there was no mounding in the lakeside yard behind the seawall. The court re-adjusted the lake level upwards by several inches on numerous occasions thereafter. In June 1997, the court increased the lake's level by four inches. In November 1998, the court raised the lake's level to 890.88 feet above sea level. The court raised the lake's level another three inches to 891.13 feet above sea level in April 1999. According to plaintiff, it was during the summer of 1998 or 1999 that a mounding behind the seawall became apparent.

A. 2000-2001 State Court Proceedings

On December 11, 2000, Anna VanWulfen petitioned the court pursuant to the ILLA to re-determine the lake's normal levels. According to VanWulfen, maintaining the lake at the higher winter level, as opposed to lowering it, as had been the practice before 1997, was causing substantial damage to the property. In VanWulfen's view, the increased lake level had caused ice to smash against the seawall and the home, created noticeable mounding that pushed into the home, and saturated the home's supporting soil such that the it was being "destroyed from the ground up."

The circuit court, Judge John F. Kowalski presiding, issued an opinion and order on October 19, 2001. It framed the issue as whether the damage to the VanWulfens' home resulted from the lake levels or some other cause. After considering the testimony of numerous experts, including testimony that the home's settling was due to the fact that it had been built over peat, it concluded that "the lake level, which existed between 1970-1982, caused no structural damage, earth mound or any other problems . . . ." In coming to this conclusion, the court stated that it was "not able to find that the problems with the VanWuflen home, except for the mounding in front of the home, are related to the lake level of Avery Lake." The court readjusted the lake level to 890.3 feet above sea level for the winter months and 891.3 feet during the summer months, which is the same level applied between 1970 and 1982. VanWulfen did not attempt to bring any other claims in this proceeding.

B. April 2002 State Court Action

In April 2002, plaintiff filed suit in the court of claims against the county, as well as the county drain commissioners, alleging that the higher lake levels between 1997 and 2001 had

raised the ground water level permitting the house to sink into the ground, created damage due to freeze and thaw, and "smashed the retaining wall due to ice pressure." Plaintiff asserted claims of inverse condemnation,[1] trespass and nuisance, and gross negligence. Plaintiff did not raise any federal claims in this complaint, nor attempt to reserve any federal claim for the federal forum.

The case was removed to circuit court, Judge Joseph P. Swallow presiding, where defendants moved for summary disposition. The court granted defendants' motion with respect to gross negligence, finding that plaintiff failed to show a genuine issue of material fact. Before ruling on the inverse condemnation portion of defendants' motion, the court noted that it must constrain its inquiry "to whether the mounding in front of the VanWulfen home constitutes a taking of Plaintiff's property resulting in permanent deprivation of possession or use of the property." According to the court, collateral estoppel barred consideration of the causation element of plaintiff's inverse condemnation claim because the court had previously stated during the 2000-2001 ILLA proceedings that "[it] is not able to find that the problems with the VanWulfen home, except for the mounding in front of the home, are related to the lake level of Avery Lake." Ultimately, the court determined that questions of fact remained as to whether plaintiff had suffered a compensable taking. This matter was left for trial. However, the parties stipulated to a dismissal without prejudice.

C. July 2004 Federal Court Action

Several months later, in July 2004, plaintiff filed suit in federal district court, asserting claims of a federal taking under the Fifth Amendment and inverse condemnation under the Michigan Constitution.[2] The federal court, on defendants' motion for summary judgment, dismissed plaintiff's federal takings and inverse condemnation claims on the grounds that they were not ripe because plaintiff failed to fully pursue an inverse condemnation claim in state court. *VanWulfen v Montmorency Co*, 345 F Supp2d 730, 741-743 (ED Mich 2004).

D. December 2004 State Court Action

Consequently, in December 2004, plaintiff filed a new complaint in state circuit court, Judge Richard M. Pajtas presiding, again asserting claims of a federal taking under the Fifth Amendment and inverse condemnation under the U.S. and Michigan Constitutions. Defendants moved for summary disposition, arguing that plaintiff failed to state a federal takings claim or inverse condemnation claim and that res judicata barred plaintiff's gross negligence claim.

---

[1] Plaintiff alleged a claim of inverse condemnation generally; he did not cite either the U.S. Constitution or the Michigan Constitution.

[2] Plaintiff also raised his gross negligence claim again. However, the federal court concluded that plaintiff's gross negligence claim was precluded because of the state court's previous dismissal of that claim. *VanWulfen v Montmorency Co*, 345 F Supp2d 730, 740 (ED Mich 2004). Plaintiff raised this claim yet again in his subsequent state action in December 2004. The state court concluded that the gross negligence claim was barred.

Plaintiff's response brief to defendants' motion relied upon both federal and state law. The circuit court concluded that issues of fact remained regarding plaintiff's takings claims.

Before trial, defendants moved for clarification requesting that the matter be limited to the mounding in front of plaintiff's seawall consistent with Judge Swallow's 2003 opinion and order finding that collateral estoppel barred consideration of lake levels as the cause of damage to plaintiff's home. The court denied the motion. Defendants moved for reconsideration and plaintiff did not file a response. Subsequently, the court, relying on *Zerfas v Eaton Co Drain Comm'r*, 326 Mich 657; 40 NW2d 763 (1950), granted defendants' motion finding that "any claims . . . relating to causation of and damage to the house are barred by res judicata as it [sic] was previously litigated in the lake level case before Judge Kowalski [in 2001]." After this determination, the parties stipulated to a bench trial, rather than a jury trial, and submitted trial briefs and exhibits to the court. The parties further agreed that their decision to forgo a jury trial in state court in no way "constitute[d] a waiver of any party's right to seek a trial by jury in federal Court."

In his trial brief, plaintiff, for the first time, asserted an *England* Reservation.[3] In other words, plaintiff indicated that he only sought a resolution of his inverse condemnation claim and did not provide any argument with respect to his federal claim in hopes of reserving it for the federal forum. Plaintiff then argued, relying entirely on state law, that defendants' action of raising the lake level caused ice pressure to move the seawall and create a mound on his property, amounting to a regulatory taking and a physical occupation of his property. To support his contention, plaintiff relied on the deposition testimony of his expert, Gary Dannemiller, a hydrologist, who asserted that "frost heaving," due to the higher lake level, caused the mounding and damage to the seawall. In Dannemiller's view, the elevation of the groundwater in the lakeside yard of plaintiff's property increased with the lake's level. Because the groundwater was "pushed high enough so that it would freeze," it follows that when it freezes, it increases the "volume of the voids [in the saturated soil] by nine percent." In addition, ice—due to the higher lake level—had also exerted pressure on the wall. These forces, in plaintiff's view, are what caused the mounding on plaintiff's property and have pushed the top of the seawall toward the lake. Dannemiller also testified that the soil along the seawall is composed of fine to medium sand, which is susceptible to frost heaving.

Defendants, in their trial brief, argued that plaintiff could not prove that defendants' adjustment of the lake level was the "substantial cause" of the mounding. Defendants presented photographic evidence showing that the mounding had gotten worse after 2001 when the winter lake level was reduced to its historical level of 890.3 feet above sea level. Defendants also produced evidence showing that the seawall had moved 12 inches toward the house after the lake level's reduction.

In addition, defendants relied upon the expert testimony of Duane MacNeill, a professional engineer, who believed "wind-driven ice floes," or ice pressure from wind pushing

---

[3] *England v Louisiana State Bd of Medical Examiners*, 375 US 411, 412-413; 84 S Ct 461; 11 L Ed 2d 440 (1964).

ice against the wall, had caused the mounding. This phenomenon occurs independently of, and has no relation to, the lake's level. In MacNeill's view, the seawall is under pressure due to ice movement and, as a result and in conjunction with the wall's lack of "footing[s]," the structure has moved toward plaintiff's house causing the ground to mound. According to MacNeill, such wind-driven ice can exert tremendous pressure. Although MacNeill did not personally observe the phenomenon on Avery Lake he indicated that he had observed wind forcing ice across land on a different lake. The drain commissioner also testified that he had observed such an ice floe on Avery Lake, including on one occasion an "ice flow" that had pushed a dock up onto shore. MacNeill's theory was based on photographic evidence, as well as several site visits to rule out the possibility that tree roots were causing the problem and to determine whether the wall had a sufficient base. MacNeill also testified that what was occurring on plaintiff's property was inconsistent with Dannemiller's frost heave theory because any expansion due to freezing is temporary and the soil will re-settle when it thaws as there is no longer any force to hold up the mound. MacNeill further indicated that frost heaving was not likely the cause because mounding did not occur at the ends of the seawall, which turned perpendicular to the house.

Subsequently, the court entered a no cause of action order against plaintiff as to his inverse condemnation claim for damage to the lakeside yard and seawall only. The circuit court found that plaintiff had failed to meet the burden of proof. Further, with respect to plaintiff's federal takings claim, the court deemed plaintiff's "hope of preserve[ing] the issue for litigation in Federal Court" to be an abandonment of the claim. Thus, the court dismissed the claim. This appeal followed.

II. Preclusion

Plaintiff first argues that his inverse condemnation claim with respect to damage caused to the home by the lake levels should not be barred by res judicata because the court was acting in an administrative capacity. We disagree.

A. Standard of Review

We review a trial court's determination on a motion for reconsideration for an abuse of discretion. *Shawl v Spence Brothers, Inc*, 280 Mich App 213, 218; ___ NW2d ___ (2008). We review a court's application of the preclusion doctrines de novo. *VanVorous v Burmeister*, 262 Mich App 467, 476; 687 NW2d 132 (2004); *Wayne Co v Detroit*, 233 Mich App 275, 277; 590 NW2d 619 (1998).

B. Res Judicata and Collateral Estoppel

The doctrine of res judicata is intended to prevent multiple suits on matters already litigated. *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412, 418; 733 NW2d 755 (2007). "The doctrine [of res judicata] bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Id*. (citation omitted). At the outset, we note that although the lower court granted defendants' motion for reconsideration based on res judicata, the court's decision is more properly characterized as denying relitigation of a single issue because the court's rationale is consistent with collateral estoppel, or issue preclusion. The doctrine of collateral estoppel requires that "(1) a question of

fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel." *Estes v Titus*, 481 Mich 573, 585; 751 NW2d 493 (2008).

Our Supreme Court has already decided the issue raised on appeal. In *Zerfas*, *supra* at 659-660, plaintiffs, riparian owners, sough injunctive relief after the court had determined the lake level and permitted construction of a dam in petition proceedings under the ILLA. Plaintiff's bill of complaint sought to enjoin the construction of the dam on the grounds that the ILLA was unconstitutional because it permitted a taking of private property without due process of law. *Id.* at 660-661. The Court determined that:

> The decree entered in [the petition] proceeding, from which decree no appeal was taken, was a final adjudication of the right to construct the dam at the outlet of . . . [the] lake. Necessarily the constitutionality of the cited statute was involved. It follows that such adjudication is a complete defense as a matter of *res judicata* to the issues presented by the bill of complaint in the instant case, and that plaintiffs herein could not be decreed the relief sought –i.e., that the drain commissioner be perpetually enjoined from constructing such dam. [*Id.* at 664 (citations omitted and emphasis in original).]

We find that the rationale of *Zerfas* applies equally to the doctrine of collateral estoppel.

C. Application

In the instant matter, plaintiff petitioned the circuit court to readjust the lake levels. During those proceedings, Anna VanWulfen asserted that the higher lake levels were damaging the property, including the house. The court determined that it was "not able to find that the problems with the VanWuflen home, except for the mounding in front of the home, are related to the lake level of Avery Lake." As a result of the petition the court lowered the lake level to its previous level. Plaintiff then filed a separate lawsuit alleging claims of inverse condemnation, trespass and nuisance, and gross negligence, based on his contention that the lake levels between 1997 and 2001 had damaged the home. The court concluded that collateral estoppel barred the portion of plaintiff's claim relating to damage caused to the home. That case was dismissed by stipulation and plaintiff filed a new lawsuit in federal district court. The federal court dismissed that action on ripeness grounds. Plaintiff then filed another complaint in state court, alleging a federal takings claim and an inverse condemnation claim under the U.S. and Michigan Constitutions. The court found that plaintiff's takings claims were barred with respect to damage caused to the home, but not with respect to the mounding.

This was the correct result. The 2000-2001 lake level determination was a final adjudication from which no appeal was taken. *Zerfas*, *supra* at 664. Although the circuit court did not actually adjudicate plaintiff's individual rights, as the ILLA does not provide such protections, *In re Van Ettan Lake*, 149 Mich App 517, 525-526; 386 NW2d 572 (1986), the court did adjudicate the issue of whether plaintiff's property had been damaged and made findings with respect to that issue. *Heeringa v Petroelje*, 279 Mich App 444, 449-450; ___ NW2d ___ (2008) (concluding that findings of fact made during adjudicatory proceedings have preclusive effect). As part of the ILLA proceedings, this issue of whether plaintiff's property had been damaged was necessarily considered and "litigated" by the parties during a two-day hearing. See

MCL 324.30707(4); *Zerfas*, *supra* at 664. It follows, like in *Zerfas*, that plaintiff is collaterally estopped from relitigating the issue of whether the lake levels caused damage to the home. To conclude, it is clear that all three elements of collateral estoppel are met, such that the issue of damages to the home is barred: A question of fact essential to the judgment was actually litigated and determined by a valid and final judgment during the petition proceedings, the same parties had a full and fair opportunity to litigate the issue during a two day hearing, and there was mutuality of estoppel. *Estes*, *supra* at 585. Although the court premised its conclusion on res judicata, it nonetheless reached the correct result. We will not reverse when the lower court reaches the correct result albeit for the wrong reason. *Shember v Univ of Michigan Medical Ctr*, 280 Mich App 309, 329; ___ NW2d ___ (2008).

Plaintiff's argument that proceedings under the ILLA are administrative, meaning that the doctrines of collateral estoppel and res judicata do not apply, must necessarily fail because the *Zerfas* Court determined that ILLA proceedings are adjudicatory in nature. *Zerfas*, *supra* at 664. We are bound to follow the decisions of the Supreme Court until it overrules itself. *O'Dess v Grand Trunk Western R Co*, 218 Mich App 694, 700; 555 NW2d 261 (1996). Thus, we conclude that the circuit court did not abuse its discretion by granting defendants' motion for reconsideration and precluding from consideration the issue of whether lake levels caused damage to plaintiff's home.

III. Inverse Condemnation

Plaintiff next argues that the circuit court erred by finding that defendants' actions did not substantially cause plaintiff's damages. Plaintiff's argument is premised on his position that, regardless of which expert is believed, the destructive force that caused damage to the property—the higher lake levels—was set in motion by defendants. We cannot agree. We review the trial court's findings of fact for clear error. *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 127; 737 NW2d 782 (2007). A finding is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made. *Heindlmeyer v Ottawa Co Concealed Weapons Licensing Bd*, 268 Mich App 202, 214; 707 NW2d 353 (2005). We must give deference to the lower court's findings in conducting this review. *Id.* at 214 n 3.

An inverse condemnation claim arises where the government takes private property without commencing condemnation proceedings. *Electro-Tech Inc v H F Campbell Co*, 433 Mich 57, 88-89; 445 NW2d 61 (1989). When such a taking occurs, the Michigan Constitution entitles the property owner to just compensation for the taking. *Id.* at 89. "To be liable for a 'taking' for purposes of inverse condemnation, the property owner must demonstrate that the government, by its actions, has effectively and permanently deprived the owner of any possession or use of the property." *Ligon v Detroit*, 276 Mich App 120, 131; 739 NW2d 900 (2007) (quotation marks and citation omitted). A plaintiff must show a causal connection between the government's actions and the alleged damages, *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 548-549; 688 NW2d 550 (2004), in that the "government's actions were a substantial cause of the decline of its property . . . [and must also prove] that the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property," *Merkur Steel Supply Inc v Detroit*, 261 Mich App 116, 130; 680 NW2d 485 (2004) (citation omitted).

In the present matter, after considering the opinions of plaintiff and defendants' experts, the court concluded:

> This court cannot conclude that the lack of a winter drawdown of the lake level between 1997 and 2001 was the substantial cause of the mounding on the property adjacent to the seawall. The court gives more weight to the theory that wind-driven ice floes from the lake are pushing the seawall backward causing the mounding. There is no evidence of record that the latter phenomenon is dependent on lake level. At best, the experts [sic] opinions are equal which means the plaintiff has failed to meet his burden of proof by the preponderance of the evidence. As such, the court cannot find inverse condemnation or a causal connection between the defendants [sic] action and the alleged damages.

After our review of the record, and in light of the circuit court's consideration of the evidence, we cannot conclude that that court clearly erred. Contrary to plaintiff's position, MacNeill's causation theory was unrelated to, and independent of, the lake levels. It does not follow, as plaintiff would have us believe, that defendants necessarily set in motion the destructive force, allegedly the lake levels, that caused damage to the property. As plaintiff has raised no other arguments with respect to this issue, we conclude that the circuit court did not reversibly err when it declined to conclude that defendants' actions were a substantial cause of the mounding on plaintiff's property.

IV. Expert Witness

Plaintiff also argues that the circuit court committed reversible err by considering the expert testimony of Duane MacNeill because his opinions were unreliable and unscientific inconsistent with MRE 702. We disagree. We review a trial court's decision to admit or exclude expert testimony for an abuse of discretion. *In re Wentworth*, 251 Mich App 560, 562-563; 651 NW2d 773 (2002). A court abuses its discretion if its decision is outside the principled range of outcomes. *Dep't of Environmental Quality v Waterous Co*, 279 Mich App 346, 380; ___ NW2d ___ (2008). Further, it is for the trier of fact to decide which expert to believe and the weight to be afforded the testimony. *Guerrero v Smith*, 280 Mich App 647, 669; ___ NW2d ___ (2008).

MRE 702 controls the admission of expert testimony and states:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Thus, for expert testimony to be admissible "(1) the witness [must] be an expert, (2) there are facts in evidence that require or are subject to examination and analysis by a competent expert, and (3) the knowledge is in a particular area that belongs more to an expert than to the common man." *Dep't of Environmental Quality*, *supra* at 381. The expert's testimony, including the underlying data and the methodologies relied upon, must also be reliable and a circuit court must

ascertain its reliability before admitting the testimony. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779; 685 NW2d 391 (2004). As our Supreme Court noted in *Gilbert*, the vetting of expert testimony requires "a searching inquiry:"

> [I]t is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology. [*Id.* at 782 (footnote omitted).]

Here, the thrust of plaintiff's arguments is that MacNeill's testimony was unreliable. Plaintiff first contends that MacNeill's testimony regarding the windblown ice phenomenon was unsupported by any facts. Plaintiff's position is factually inaccurate. The VanWulfens admitted during ILLA petition proceedings in 1996 that wind had blown ice toward their shores and that ice had pushed their seawall forward. A previous owner of the property also admitted during the 2001 ILLA petition proceedings that he observed wind force ice from the lake onto the shore. MacNeill himself also observed the phenomenon of ice being pushed across land by the force of wind. On one occasion, the county's drain commissioner observed a dock that had been pushed up on shore by an "ice floe." The fact that some evidence contradicted MacNeill's theory, and the fact that MacNeill did not consult wind-speed data and did not personally observe the phenomenon on Avery Lake is immaterial to MacNeill's reliability. Thus, we cannot conclude that the court abused its discretion by admitting and considering MacNeill's deposition testimony pursuant to MRE 702.

In any event, the circuit court may very well have taken the factors plaintiff cites into account when considering what weight, if any, MacNeill's testimony should be afforded. These are issues for the trier of fact to judge, not this Court, and we will defer to the trier of fact's judgment. *Guerrero*, *supra* at 669. Further, we will not disturb the court's findings in this regard unless we would have reached a different result had we been in the court's position. *Jott, Inc v Clinton Charter Twp*, 224 Mich App 513, 525-526; 569 NW2d 841 (1997). After our review of the record, we cannot conclude that, had we occupied the circuit court's position, we would have reached a different result.

We must reject plaintiff's other arguments that MacNeill's testimony lacked reliability for this same reason. Specifically, plaintiff asserts that MacNeill's contention that the mounding began shortly after the seawall was built is unreliable because MacNeill admitted that he had no personal knowledge of that supposed fact and that MacNeill's methodology for testing the seawall's foundation was unreliable because MacNeill simply probed the ground with a rod instead of digging down to the wall's base. Again, these arguments relate to the believability of MacNeill's testimony and to the weight it should be given, not to whether the circuit court should have admitted the testimony pursuant to MRE 702. We will defer to the trier of fact's judgment on these issues. *Guerrero*, *supra* at 669.

Lastly, plaintiff contends that MacNeill's rejection of Dannemiller's frost heave theory as the cause of the mounding is unreliable and unscientific because MacNeill admitted that he never observed frost heave at Avery Lake and because MacNeill is not a hydrologist. We disagree. MacNeill indicated during his deposition that his testimony was based on scientific principles. MacNeill also testified that he had observed land that had been lifted up due to frost subside after

a thaw while employed at the highway department. Both MacNeill's 30 years of practical experience as an engineering consultant and his educational background, which includes training in hydrology, qualified him to testify to these matters and it is irrelevant that he did not observe frost heave on plaintiff's property. MacNeill was called upon to testify to the cause of the mounding on plaintiff's property. We can see no reason—and plaintiff has not proffered one—why it was necessary that MacNeill have some special heightened expertise in hydrology beyond that which he has acquired through both his formal education and his extensive practical experience. See *Farr v Wheeler Mfr Corp*, 24 Mich App 379, 384-388; 180 NW2d 311 (1970). For the foregoing reasons, we conclude that the court did not abuse its discretion by admitting and considering MacNeill's testimony.

V. Great Weight of the Evidence

Plaintiff further contends that the circuit court's verdict was against the great weight of the evidence. Because plaintiff did not present a motion to this effect below, plaintiff has failed to preserve this argument for appellate review and, thus, this argument is waived unless a miscarriage of justice would result. *Hyde v Univ of Michigan Bd of Regents*, 226 Mich App 511, 525; 575 NW2d 36 (1997). Plaintiff's argument on appeal is simply that plaintiff's expert, Dannemiller, was more convincing that defendants' expert, MacNeill. We have already concluded that MacNeill's testimony was properly admitted and considered pursuant to MRE 702. Given that the weight to be afforded such testimony is best left to the trier of fact and not this Court, *Guerrero*, *supra* at 669, we fail to see how our refusal to consider the issue will result in a miscarriage of justice. As plaintiff has presented no other argument showing us that an injustice will result, we consider plaintiff's argument waived. *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 464; 633 NW2d 418 (2001); *Hyde*, *supra* at 525.

VI. Reservation of Federal Claim

On cross-appeal, defendants argue that the circuit court erred by accepting plaintiff's *England* Reservation because it was untimely made. We cannot conclude that the circuit court erred.

A. Standard of Review

This issue presents a question of law that we review de novo. *Wold Architects and Engineers v Strat*, 474 Mich 223, 229; 713 NW2d 750 (2006).

B. The *England* Reservation Doctrine

An *England* Reservation permits a litigant to preserve a federal claim distinct from an antecedent state action that may moot the federal issue. This doctrine was formulated in *England v Louisiana State Bd of Medical Examiners*, 375 US 411, 412-413; 84 S Ct 461; 11 L Ed 2d 440 (1964), where appellants, a group of chiropractors, brought suit in a Louisiana federal district court, alleging that Louisiana's Medical Practice Act, as applied to them, violated the Fourteenth

Amendment. The federal court applied the *Pullman* abstention doctrine,[4] staying the proceedings in federal court, and affording the state court an opportunity to determine whether the act applied to the chiropractors. *Id.* In effect, if the state court determined that the act did not apply to appellants, this would end the controversy and there would be no reason for the federal court to hear the Fourteenth Amendment claim. Upon returning to state court, appellants fully litigated both their state and federal claims. *Id.* at 413. The Louisiana appellate court determined that the act applied to them and did not violate the Fourteenth Amendment; the Louisiana Supreme Court denied review. *Id*. at 413-414. Upon returning to federal district court, the district court dismissed appellant's complaint on the grounds that the issues had already been decided in state court. *Id*. at 414. On appeal to the United States Supreme Court, the Court held that a party who is remitted to state court under the abstention doctrine court may reserve his federal claims by refusing to litigate them in the state forum. *Id*. at 421-422. However, if the party, without reservation, freely and fully litigates his federal claims in the state forum, that party has relinquished his right to return to federal court. *Id.* at 419, 421-422.

The Supreme Court more recently explained its decision in *England* in *San Remo Hotel, LP v San Francisco*, 545 US 323, 338-340; 125 S Ct 2491; 162 L Ed 2d 315 (2005). The Court indicated that its holding in *England* was limited to cases where the state issue is distinct from the federal one and opined that "typical" *England* cases involve those where the federal question will be made moot by the state court determination. *Id.* at 339-340. The Court stated:

> 'Typical' *England* cases generally involved federal constitutional challenges to a state statute that can be avoided if a state court construes the statute in a particular manner. In such cases, the purpose of abstention is not to afford state courts an opportunity to adjudicate an issue that is functionally identical to the federal question. To the contrary, the purpose of *Pullman* abstention in such cases is to avoid resolving the federal question by encouraging a state-law determination that may moot the federal controversy. [*Id.* at 339 (footnote and citations omitted).]

The court held that an *England* Reservation will not negate any preclusive effect that a state court judgment may have with respect future federal litigation. *Id.* at 338.

Here, however, plaintiff was not involuntarily forced into state court after the federal court invoked a *Pullman* abstention. Rather, plaintiff's claim was never properly before the federal court as that court deemed his takings claims to be unripe under *Williamson Co Regulatory Planning Comm'n v Hamilton Bank*, 473 US 172; 105 S Ct 3108; 87 L Ed 2d 126 (1985). In *Williamson Co*, the Supreme Court indicated that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id*. at 195. Thus, a takings claim will not be ripe for review in the federal forum until the plaintiff has sought compensation through state court procedures. *Id.* at 194-195. It would seem to necessarily follow that a plaintiff must file in state court first. Alternatively, if the plaintiff first

---

[4] *Railroad Comm'n of Texas v Pullman Co*, 312 US 496; 61 S Ct 643; 85 L Ed 971 61 (1941).

files his claim in federal court, his claim would be deemed unripe and he would be required to return to state court. In many instances, however, state takings law and federal law are synonymous and, thus, a plaintiff risks preclusion of his claims in the federal court when he returns to that forum.

The Supreme Court's decision in *San Remo Hotel*, however, indicates that an *England* Reservation has no place in the litigation when the litigant finds himself in state court pursuant to *Williamson Co*. *San Remo Hotel*, *supra* at 33-341; see *Montana v United States*, 440 US 147, 163; 99 S Ct 970; 59 L Ed 2d 210 (1979). In *San Remo Hotel*, the petitioners' as applied claims were found to be unripe under *Williamson Co.* The Court stated:

> Unlike their [facial constitutional challenge], petitioners' as-applied claims were never properly before the District Court, and there was no reason to expect that they could be relitigated in full if advanced in the sate proceedings. In short, our opinion in *England* does not support petitioners' attempt to circumvent [the preclusion doctrines of the full faith and credit clause]. [*San Remo Hotel*, *supra* at 341.]

The Court then went on to state, "The relevant question . . . is not whether the plaintiff has been afforded access to a federal forum; rather, the question is whether the state court actually decided an issue of fact or law that was necessary to its judgment." *Id*. 342. Thus, where the federal question and the state question are one in the same, the *England* Reservation will not function to insulate a plaintiff's claim. Further, given the purpose of *England* and the context in which *England* was decided, the *England* Reservation is simply inapplicable when a federal court dismisses an action pursuant to *Williamson Co*. See *Treister v Miami*, 893 F Supp 1057, 1071 (SD Fla 1992) (*England* inapplicable where jurisdiction has not been properly invoked due to lack of ripeness). Stated otherwise, as numerous federal courts have concluded, the *England* Reservation is only appropriate where a litigant has properly invoked the jurisdiction of the federal court, the federal court has abstained on *Pullman* grounds, and the litigant has found himself involuntarily in federal court. See *Duty Free Shop, Inc v Administracion de Terrenos*, 889 F2d 1181, 1183 (CA 1, 1989) ("[*England*] permits a plaintiff who files a case in federal court *before state proceedings begin* to tell the state court that it wishes to litigate its federal claim in that *federal* court; it thereby permits the *federal* court to engage in *Pullman* (not *Younger*) abstention, a form of abstention that permits the federal court, in effect, to ask a state court to clarify a murky question of *state* law involved in the case, while permitting the plaintiff to *return* to the federal forum for determination of the federal question after the state court has decided the issue of state law." (emphasis in original)); *Schuster v Martin*, 861 F2d 1369, 1373–1374 (CA 5, 1988) (*England* does not apply where litigant voluntarily chooses to pursue state action first and there was never any abstention by federal court); *Tarpley v Salerno*, 803 F2d 57, 59-60 (CA 2, 1986) (*England* not applicable where there was never an abstention by federal court); *Griffin v Rhode Island*, 760 F2d 359, 360 n 1 (CA 1, 1985) (*England* inapplicable where plaintiff first filed takings claims in state court).

C. Application

Turning to the instant matter, plaintiff originally filed a three-count complaint in state court in April 2002, alleging inverse condemnation, trespass and nuisance, and gross negligence. Before trial, the parties stipulated to dismiss the case without prejudice. Then, in July 2004,

plaintiff filed suit in federal district court, alleging in a taking under the Fifth Amendment and inverse condemnation under the Michigan Constitution. The federal district court found that neither of the takings claims were properly before it pursuant to *Williamson* and dismissed plaintiff's case for lack of subject matter jurisdiction. *VanWulfen*, *supra* at 741-743. The federal district court appears to have considered plaintiff's federal taking claim "to be grounded in the theory of inverse condemnation . . . ." *Id.* at 743. Thus, the court did not abstain from deciding the federal takings claim under the *Pullman* doctrine, but rather the matter was never properly before the court pursuant to *Williamson*. *Id.* at 741-743.

Thereafter, plaintiff returned to state court to pursue his inverse condemnation claim. Plaintiff filed the same complaint it had filed in federal district court and made no attempt to reserve a federal claim. Subsequently, the parties stipulated to a bench trial, at which point the parties also agreed that their decision to forgo a jury trial in no way "constitute[d] a waiver of any party's right to seek a trial by jury in federal Court." Then, for the first time during the litigation, plaintiff asserted an *England* Reservation in his trial brief and restricted the scope of his argument to state law. When the circuit court announced its opinion, it noted that it considered the federal portion of plaintiff's claim to be "abandoned" and dismissed the claim.

In our view, plaintiff's assertion of the *England* Reservation was inappropriate in the context of this case. Plaintiff originally filed his claim in state court. The parties stipulated to dismiss that action and plaintiff filed in federal district court. That court did not abstain pursuant to *Pullman*; rather, the issue was never properly before that court as the matter was not ripe pursuant to *Williamson Co*. Thus, the requirements for an *England* Reservation have not been met: Plaintiff did not first file in federal court and get punted back to state court on *Pullman* grounds, thereby finding himself to be involuntarily in state court. See *Duty Free Shop, Inc*, *supra* at 1183; *Schuster*, *supra* at 1373-1374; *Tarpley*, *supra* at 59-60; *Griffin*, *supra* at 360 n 1. We note that even repeated attempts to make such a reservation in this context fail. See *Fuller Co v Ramon I Gil, Inc*, 782 F 2d 306, 311-312 (CA 1, 1986) (despite repeated attempts at reservation, litigant's reservation failed because *England* requirements not met). Thus, we consider the parties' stipulation to also be ineffective for purposes of reserving plaintiff's federal claim.

Defendants, however, ask this Court to reverse the circuit court's acceptance of the reservation and find that it is invalid because it was untimely made. Defendants have mischaracterized the circuit court's decision. The circuit court did not accept the reservation; rather, the court explicitly stated that as a result of plaintiff's attempt to reserve the issue, it considered plaintiff's federal claim to be "abandoned" and dismissed the count. We can see no error in this course of action as plaintiff voluntarily abandoned this count of his complaint. Further, we cannot agree that the court's decision effectively amounted to an acceptance of the reservation. Rather, as we have already noted, an *England* Reservation is inapplicable in this context and, thus, plaintiff's reservation was ineffective from the outset—the circuit court's determination cannot have the effect of an acceptance because the reservation was null and void in the first instance. Because an *England* Reservation is not appropriate in this case, we cannot conclude that the circuit court erred by finding that plaintiff abandoned his federal claim when plaintiff voluntarily chose not to submit his claim to the state court.

Affirmed.

/s/ Pat M. Donofrio
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering