STATE OF MICHIGAN

COURT OF APPEALS

RICHARD J. SMITH, Plaintiff-Appellant,	UNPUBLISHED August 5, 2010
v	No. 291492 St. Clair Circuit Court
CHARTER TOWNSHIP OF EAST CHINA, Defendant-Appellee.	LC No. 08-002771-CZ

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition based on governmental immunity pursuant to MCR 2.116(C)(7). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's concrete driveway and parking lot were allegedly damaged when defendant's fire hydrant leaked extensively in the winter of 2007. Seeking to recover the costs of repairing the cracked concrete, plaintiff filed a three-count complaint alleging trespass, negligence, and exemplary damages. The parties stipulated to dismiss the negligence and exemplary damages claims with prejudice. Defendant moved for summary disposition on the remaining trespass claim under MCR 2.116(C)(7), based on governmental immunity. In response, plaintiff argued that his trespass claim was actually a claim for a taking by the government, and not a tort claim, and therefore, that it was not barred by immunity. The trial court disagreed, finding that the governmental tort liability act (GTLA), MCL 691.1407, and *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002), applied to bar plaintiff's claim.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Questions of law are also reviewed de novo. *Anzaldua v Band*, 457 Mich 530, 533; 578 NW2d 306 (1998).

We first note that plaintiff never alleged a constitutional taking issue, and conclude that the facts of this case do not support a taking claim. *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 74 n 19; 445 NW2d 61 (1985), citing *First English Evangelical Lutheran Church of Glendale v Los Angeles Co*, 482 US 304, 318-320; 107 S Ct 2378; 96 L Ed 2d 250 (1987). When a landowner's property has been taken by the government for public use without the commencement of condemnation proceedings, the person may assert a "taking" claim under the theory of inverse or reverse condemnation. *Ligon v Detroit*, 276 Mich App 120, 122 n 1; 739

NW2d 900 (2007). "'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.'" *Id*. at 131, quoting *Dep't of Transp v Tomkins*, 270 Mich App 153, 161-162; 715 NW2d 363 (2006) rev'd on other grounds, 481 Mich 184; 749 NW2d 716 (2008).

Although a taking claim based on physical invasion and a trespass-nuisance claim are similar, the two actions are distinct. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 206-207; 521 NW2d 499 (1994). And, to reiterate, a taking requires government action that deprives the owner of the use or possession of his property. *Ligon*, 276 Mich App 131. Plaintiff seeks recompense for the expense of repairing the cracked concrete; he makes no allegation that he was deprived of possession or use of his property, or that his property decreased in value at all. Thus, we agree with defendant that plaintiff has not claimed a taking and the record does not support such a claim.[1]

We affirm. Defendant, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ William C. Whitbeck

[1] We decline to address plaintiff's argument that *Pohutski* was incorrectly decided because we are bound by that decision. Plaintiff may address this argument to our Supreme Court if he so chooses.