STATE OF MICHIGAN
IN THE 22ND CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ANITA YU, JOHN BOYER, and
MARY RAAB,

Plaintiffs,

v.

CITY OF ANN ARBOR,

Defendant.
_____/

Case No. 14-181-CC

Hon. Timothy P. Connors

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DEFENDANT CITY OF ANN ARBOR'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR SANCTIONS PURSUANT TO MCR 2.114 AND AMENDED BRIEF

Plaintiffs' Motion for Sanctions Pursuant to MCR 2.114 should be denied because it is

without legal or factual basis or merit. Plaintiffs' motion and Plaintiffs' 1/29/15 Brief, which rewrites the motion, are so limited in factual and legal basis and so without legal merit they might themselves warrant an imposition of sanctions against counsel for Plaintiffs by the Court, on its own initiative, under MCR 2.114(E). Neither Defendant City of Ann Arbor nor this Court should have to spend time responding to such patently baseless assertions and arguments.

INTRODUCTION

A. The Context of This Motion

Not counting Plaintiffs' motion for preliminary injunction regarding Plaintiffs' footing drain disconnects ("FDDs"), which were done approximately 11 and 12 years before this case and that motion were brought,[1] this is the third of three motions without merit that are attacks on counsel for the City and this Court. The first two were Plaintiffs' motions to disqualify Judge Connors[2] and Plaintiffs' motion to disqualify Ms. Elias and the other attorneys in the City Attorney's Office.

This motion for sanctions, which also is without merit, seems to be a continuation of that harassing behavior.[3] This motion does not advance this case and does nothing to further the

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[1] Plaintiffs' motion for preliminary injunction was denied.

[2] Plaintiffs first filed a motion asking Judge Shelton to assign the case to a judge other than Judge Connors, which was denied. Plaintiffs re-filed that motion as a motion before Judge Connors to disqualify Judge Connors.

[3] In August 2012, Mr. Mermelstein notified two members of the Ann Arbor City Council about his disagreement with the FDD program, but did not proceed with any lawsuit at that time. Instead, in February 2013, he filed a Request for Investigation against Abigail Elias with the Michigan Attorney Grievance Commission. His complaint against Ms. Elias included a complaint focused on the FDD program and his disagreement with her legal analysis, **in a misguided attempt to have the Attorney Grievance Commission rule on the merits of the present claims regarding the City's FDD program.** While his Request for Investigation against Ms. Elias was pending, Mr. Mermelstein requested that City Attorney Stephen Postema fire Ms. Elias because of his disagreement with her analysis, which Mr. Postema did not do. Mr. Mermelstein then filed a Request for Investigation against Mr. Postema with the Michigan Attorney Grievance Commission in March 2013, also based on Mr. Mermelstein's disagreement

interests of justice. It wastes the City's and this Court's time for Plaintiffs' improper purposes.

B. Procedural Background of This Motion

In its original brief in response to Plaintiffs' 8/20/14 Motion for Sanctions, the City objected to counsel for Plaintiffs' failure to comply with the Michigan Court Rules because they had not noticed the motion for hearing. (Page 2 of the City's 8/22/14 Brief.) The City still filed a brief in opposition and the motion was heard by Judge Shelton on August 27, 2014. Because Plaintiffs' motion for sanctions was directed at the City's brief and first reply brief in support of its motion for summary disposition, the City opposed the motion for lack of merit, but also argued that it was premature. Judge Shelton adjourned the motion for sanctions until the hearing on the City's motion for summary disposition (8/27/14 Tr., pp. 33-34; Exh. A to Plaintiffs' 1/29/15 Brief).

Plaintiffs subsequently dismissed voluntarily the two federal "counts" in their Complaint, and the City's motion for summary disposition on the state counts that remained was heard on November 20, 2014. The City's motion as to Plaintiffs' federal claims was no longer necessary. The Court granted the City's motion under MCR 2.116(C)(8) as to Plaintiffs' state statutory claim, but denied the motion as to Plaintiffs' inverse condemnation claim under the Michigan constitution. Although the City's motion under MCR 2.116(C)(7) that Plaintiffs' complaint is time barred was denied, it was denied without prejudice.

At two points during the November 20, 2014, argument, perhaps in response to the City's arguments regarding the lack of coherence or clarity in Plaintiffs' complaint, this Court seemed

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with the City's FDD program. On November 20, 2013, the Attorney Grievance Commission closed both of Mr. Mermelstein's Requests for Investigation without action. The letters closing Mr. Mermelstein's requests both state that the Attorney Grievance Commission does not "review legal conclusions made by attorneys during the course of their business." Copies of those letters are attached as Exhibit 1.

to recognize the lack of clarity in Plaintiffs' Complaint as to what their claims are, noting, "One could argue we need more specificity, et cetera" (11/20/14 Tr., p. 31, Lines 5-6; Exh. B to Plaintiffs' 1/29/15 Brief), and "Certainly, we may have an argument the pleadings need to be more specific or amendments to pleadings" (11/20/14 Tr., p. 35, lines 2-3; Exh. B to Plaintiffs' 1/29/15 Brief).

At no point, however, did the Court question the validity or the appropriateness of the City's arguments. In addition, because motions for summary disposition under MCR 2.116(C)(7) and (8) are based on the pleadings, including written instruments attached as exhibits to the complaint, MCR 2.113(F)(1) and (2),[4] the City could not have and did not add to the record or go outside the pleadings and Plaintiffs' attached exhibits, as Plaintiffs now seem to argue the City should have done.

In their amended (1/29/15) brief, counsel for Plaintiffs present arguments that do not correlate and are irrelevant to the grounds for sanctions set out in their motion dated August 20, 2014.[5] Plaintiffs' motion, which has not been amended, is limited to (1) the City's June 9, 2014, brief and August 6, 2014, reply brief in support of its motion for summary disposition. Plaintiffs' amended brief also asserts that it is directed at filings in the federal court (Plaintiffs' 1/29/15 Brief pp. 1 and 4),[6] which are not only beyond the scope of their motion, but are also beyond this

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[4] See, *Slater v Ann Arbor Pub Sch Bd of Educ*, 250 Mich App 419, 427-428; 648 NW2d 205 (2002) (an exhibit attached or referred to in a pleading becomes a part of the pleading for all purposes).

[5] Plaintiffs state that they incorporate by reference their original (8/20/14) brief. (Plaintiffs' 1/29/15 Brief at p. 1, fn. 1), even though it is apparent from their 1/29/15 Brief that they have abandoned and replaced the original subjects of their motion. If Plaintiffs are permitted to combine their original and amended briefs so as to double their page limit and their attack, the City requests that it also be allowed to incorporate by reference, and that the Court consider, its original (8/22/14) brief in opposition to Plaintiffs' motion for sanctions.

[6] Plaintiffs did not attach a copy of the federal document(s) against which they direct their attack. (Plaintiffs' 1/29/15 Brief, pp. 1-2, fn. 3.)

Court's authority to address under MCR 2.114. They also attach and ask this Court to consider exhibits that postdate the City's brief and reply brief.[7] See, pp. 11-15 of Plaintiffs' 1/29/15 Brief and attached Exhibits J-L.[8]

ARGUMENT

I. THE SCOPE OF MCR 2.114 AND THE APPLICABLE STANDARD OF REVIEW

A. MCR 2.114 Applies Only to Filings in State Court

MCR 2.114(A) provides that MCR 2.114 applies to "all pleadings, motions, affidavits, and other papers provided for by these rules." Sanctions under MCR 2.114(E) may be imposed only for documents (as defined in MCR 2.114(A)) **that have been signed and filed in violation of MCR 2.114(D)**. See, e.g., *Guerrero v Smith*, 280 Mich App 647, 678; 761 NW2d 723 (2008).

In utter disregard of these provisions, Plaintiffs[9] seek sanctions against the City and counsel for the City for filings in federal court (Plaintiffs' 1/29/15 Brief p. 1). Besides being otherwise without factual or legal basis, Plaintiffs' motion and arguments that this Court should impose sanctions against the City for documents filed in federal court is so far outside the scope of MCR 2.114 that the motion and arguments can be viewed as having been filed solely to harass, to add to the costs of litigation for the City, or for other improper purpose contrary to MCR 2.114(D)(3).

Plaintiffs also direct their attack against oral arguments before this Court on November

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[7] Plaintiffs' Motion for Sanctions, which has not been amended, was filed August 20, 2014; it could (and can) only pertain to documents filed by the City before that date.

[8] Plaintiffs' representation that the letter dated November 7, 2014, and attached as Exhibit J is relevant to this case is a gross misrepresentation. That letter does not address any issue in this case. The representation—or misrepresentation—to this Court that this letter says something it doesn't is reprehensible at best. Plaintiffs' arguments regarding the November 7, 2014, letter are addressed at length in Part IV of this brief.

[9] In this brief, the City refers to Plaintiffs and their attorneys collectively as "Plaintiffs." However, the City considers Plaintiffs' motion and briefs in support to be the work solely of Plaintiffs' attorneys, for which none of the three Plaintiffs should be held responsible.

20, 2014 (Plaintiffs' 1/29/15 Brief p. 1). An oral argument is not a document signed and filed by anyone. Again, besides being otherwise without factual or legal basis, Plaintiffs' motion and arguments that this Court should impose sanctions against the City for statements made during oral argument are so far outside the scope of MCR 2.114 that the motion and arguments can be viewed as being not only without merit but also as having been filed for improper purposes contrary to MCR 2.114(D)(3).[10]

B. Standard of Review

The City does not disagree with Plaintiffs' statement of the requirements of MCR 2.114 (Plaintiffs' 1/29/15 Brief pp. 3-4). The factual determination whether a document was signed and filed in violation of the requirements of MCR 2.114(D), i.e., whether a document was not well grounded in fact or law, is for the trial court, *Contel Sys Corp v Gores*, 183 Mich App 706, 711; 455 NW2d 398 (1990), and "whether an attorney or party has violated the "reasonable inquiry" standard of MCR 2.114(D)(2) depends largely on the facts and circumstances of the claim." *Whalen v Doyle*, 200 Mich App 41, 42; 503 NW2d 678 (1993). If appealed, the trial court's decision is reviewed for clear error. *Id*; *Contel Sys Corp, 183 Mich App at 711*. That an argument failed does not mean it was frivolous, improper or unfounded. See, e.g., *Stablein v Schuster*, 183 Mich App 477, 483; 455 NW2d 315 (1990).

II. PLAINTIFFS' MOTION AND ARGUMENTS ARE WITHOUT BASIS OR MERIT

Plaintiffs' arguments are more a vitriolic attack against counsel for the City, going beyond the bounds of facts and law relevant to a sanctions motion under MCR 2.144. See, e.g., the rambling and largely incoherent and irrelevant paragraph at the top of page 2 of Plaintiffs' 1/29/15 Brief, and the reference in the next paragraph to a public presentation by Abigail Elias to

[10] Plaintiffs recognize that the sanctions under MCR 2.114(E) are limited by MCR 2.114(A) to documents signed and filed with the Court (Plaintiffs' 1/29/15 Brief pp. 3-4). They cannot claim ignorance of the legal requirements of MCR 2.114.

an advisory committee of residents, the relevance of which to their argument and the documents filed by the City with this Court is never shown.

Notwithstanding the difficulty in following their unfocused arguments, the City responds in the order that the arguments appear.

III. PLAINTIFFS' POINT II IS WITHOUT BASIS OR MERIT

The City focuses in this brief on Plaintiffs' attack on the City's filings in this Court, as its filings in federal court are beyond the scope of a motion for sanctions under MCR 2.114. However, because Plaintiffs' arguments regarding the City's federal court filings are essentially the same as their arguments regarding the City's state court filings, the City's response applies equally to its filings in both courts.

A. References to the Administrative Consent Order (ACO)

The City does not understand why Plaintiffs cannot read, cannot understand, or choose not to understand, what the City actually wrote. On page 5 of their 1/29/15 Brief, Plaintiffs quote a true statement made by the City in its 6/9/14 brief in support of its motion for summary disposition as if it were a misrepresentation to this Court. The City's statement is not and was not a misrepresentation.

The MDEQ's Administrative Consent Order (ACO) did require footing drain disconnects (FDDs). The City's descriptive statement in footnote 7 on page 3 of its 6/9/14 brief, in the background facts narrative, is and was accurate. The statement does not say the ACO was the legal authority for the City's FDD program. The statement does not say the FDDs on the properties of the Plaintiffs were done under the ACO. It was simply a true statement of background fact that clarified the reference to the ACO by Plaintiffs in their complaint. The termination of the ACO because it had been fully satisfied was and remains irrelevant to the legal

validity of the City's FDD program.[11] The ACO never became a "dead letter,"[12] a phrase devoid of legal meaning that Plaintiffs never further explain. Contrary to Plaintiffs' misrepresentations in their 1/29/15 Brief, the City has never argued that the ACO was anything more than it is on its face. Although the City pointed out that the MDEQ recognized in the ACO that FDDs were a legitimate way to reduce sanitary sewer overflows, the City has not argued that the ACO was or is the legal basis for its FDD program, the FDD Ordinance or the FDDs on the Plaintiffs' properties.

Plaintiffs' argument they were prejudiced before this Court by the City's failure to disclose that the ACO had run its course and ended by a Notice of Termination in 2009, seven years after the FDD on Plaintiffs Boyer and Raab's property and six years after the FDD on Plaintiff Yu's property, is mystifying. The City **never** stated or argued that the ACO is still in effect. No reasonable person would interpret the City's statements regarding the ACO to be a statement or representation that it is still in effect. Further, because this case involves FDDs done in 2002 and 2003, whether or not the ACO was still in effect in 2014 is not relevant to the case.

This Court's ruling on the City's motion for summary disposition on November 20, 2014, was based on the pleadings. Plaintiffs referenced the ACO in Paragraph 22 of their Complaint. Plaintiffs' Complaint does not mention the Notice of Termination. In other words, Plaintiffs do not explain—and could not even if they wanted to—how one sentence in a footnote in the background facts section of the City's brief and two sentences to the Court during oral argument, both of which were accurate and consistent with the allegations in Plaintiffs' Complaint, did or

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[11] The City can argue that the ACO provides additional grounds for the legal validity of FDDs done to satisfy the ACO's requirements while the ACO was in effect, but the City does not need to. The City enacted the FDD ordinance and started the FDD program before the ACO was finalized and did not need the ACO as justification or as a legal basis. The FDD ordinance and program are legally valid independent of the ACO.

[12] Plaintiffs' 1/29/15 Brief p. 5.

could have misled the Court and/or prejudiced the Plaintiffs.[13] This argument is an insult to the City and to the Court.

The statements about which Plaintiffs now complain were factually accurate, were consistent with and repeated the Plaintiffs' allegations in their Complaint, and were not otherwise either misleading or improper. Plaintiffs' assertion that the City's statements and arguments "were frivolous and dishonest" is without basis, is contrary to the actual record, and is offensive to the City. It is evidence this motion for sanctions was brought by Plaintiffs solely for harassment or other improper purposes.

B. References to the Sanitary Sewer Overflow (SSO) Study and Task Force

The City does not understand what point Plaintiffs are trying to make in the first paragraph of Subsection B of Point II of their 1/29/15 Brief and cannot respond to whatever argument Plaintiffs are trying to make. However, the City's reference in its 6/9/14 brief to the "June 2001 Sanitary Sewer Overflow Prevention Report of CDM and the Citizen Advisory Task Force" is an accurate reference to a report whose cover page has "City of Ann Arbor, Sanitary Sewer Overflow Prevention Citizen Advisory Task Force" at the top, and "Report" and "Sanitary Sewer Overflow Prevention Study" and "CDM" and "Camp Dresser McKee" and "June 2001" in a couple of rows of text at or near the bottom. The City's slightly abbreviated reference to this document does not misrepresent what the report is, what it said, or what the subject of the study was. Further, as noted by the City on page 4 of its 6/9/14 brief and in footnote 9, the report is available as a public document. The City did not attach the complete report, which is 477 pages

[13] The City's motion for summary disposition under MCR 2.116(C)(7) and (8) was based on the pleadings; the City was careful not to go beyond the allegations in Plaintiffs' Complaint and reasonable inferences from those allegations. See *Peters v Dep't of Corr.*, 215 Mich App 485, 486; 546 NW2d 668 (1996) (well-pleaded factual allegations and reasonable inferences may be considered). The Complaint referred to the ACO and its requirement that FDDs be performed.

with the appendices, but provided the URL for access to the complete report if needed. [14] In Paragraphs 20-21 of their Complaint, Plaintiffs cited to and relied on the report, and included a couple of incomplete excerpts. Because the City's motion for summary disposition was directed at the Plaintiffs' Complaint, and because Plaintiffs relied on the report, inclusion of additional information from the report that was directly related to Plaintiffs' excerpts was appropriate. Attachment and discussion of all 477 pages was neither needed nor appropriate for the City's motion for summary disposition under MCR 2.116(C)(8); the City did not go beyond the pleadings but referenced and relied on the same document that Plaintiffs relied on and incorporated into their Complaint. In a motion for summary disposition under MCR 2.116(C)(8), the City had no obligation to and **could not properly introduce evidence beyond the pleadings or reasonable inferences from the pleadings.** The City relied on a document already introduced by the Plaintiffs in their Complaint, and relied on those segments corresponding to allegations in the Plaintiffs' Complaint.

Plaintiffs certainly can seek to introduce and argue about this report at the next motion for summary disposition. However, as part of the Court's denial of Plaintiffs' Motion to disqualify Abigail Elias and the other attorneys in the City Attorney's Office and decision to quash the Plaintiffs' deposition notice for Ms. Elias on August 27, 2014, Judge Shelton had already ruled that it is for the Court to decide the legality of the FDD Program and Ordinance, and that past opinions and thoughts of the City's attorneys and others are neither relevant to the Court's decision on those issues in this case, nor to be considered by the Court in making its decision on those issues. (8/27/14 Tr., p. 7, lines 3-19; p. 8, line 3 to p. 10 line 20; p. 11, lines 14-

[14] MCR 2.113(F) provides for written instruments relied on for a complaint to be part of the complaint and to be part of the pleading for all purpose. If the document is a public record or if the attachment of the document would be impractical, it need not be attached. MCR 2.113(F)(1)(a) and (d).

20; and p. 31, lines 18-23; Exh. A to Plaintiffs' 1/29/15 Brief.)[15]

Plaintiffs also have no basis for their apparent claim that the engineering study done by Camp Dresser McKee was not an engineering study, or their argument that a reference to an engineering study as an engineering study somehow improperly implies a scientific basis for the conclusions reached by the study.[16] Those claims are so mystifying and without basis that the City need not respond. Further, the quoted statement in court (Plaintiffs' 1/29/15 Brief p. 10) is **not** a "clear falsehood." Plaintiffs do not dispute that residents from the impacted areas (i.e., impacted residents") were on the task force; they simply quibble that the statement "[t]hose residents of those areas sat on the task force" implies ALL residents of the impacted areas sat on the task force. In the context of the statement, the reference to "those residents" clearly was a reference only to the "impacted residents" who sat on the task force and NOT to all impacted residents in those areas. Plaintiffs misinterpretation and/or mischaracterization of a statement at oral argument, their inability to reasonably interpret the spoken English language, their misrepresentation to this Court that the statement was a "clear falsehood," and their presentation to the Court of arguments beyond the scope of MCR 2.114(D) and (E) that are not supported either by fact or by law[17] fall on them. Plaintiffs go on to conclude, absurdly, that the "prioritizing . . . therefore never occurred" because "[t]here has never been a body called a 'Citizen Advisory Task Force' (or any 'task force') for the FDDP on which all residents of target areas sat," while recognizing in the next sentence that a representative of each target area (i.e.,

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[15] Judge Shelton did not suggest, nor does the City, that counsel for the parties should not express their legal arguments to the Court; his ruling was limited to past statements and opinions and the scope of permissible discovery.

[16] At www.thefreedictionary.com, "engineering" is defined as "[t]he application of scientific and mathematical principles to practical ends such as the design, manufacture, and operation of efficient and economical structures, machines, processes, and systems." In other words, an engineering study, by definition, has a scientific basis.

[17] MCR 2.114 does not apply to oral arguments.

from each of the impacted areas) sat on the Citizen Advisory Task Force. Collectively, these arguments are evidence, at best, of their lack of competence or, at worst, their malicious motives and improper purpose.

Again, it is evident from this preposterous argument that Plaintiffs' motion for sanctions is been brought solely for harassment or other improper purposes.

IV. PLAINTIFFS' POINT III IS WITHOUT BASIS OR MERIT

From Plaintiffs' Point III, it is clear Plaintiffs do not understand the basic terms of a motion for summary disposition under MCR 2.116(C)(8). The City filed its motion on June 6, 2014. The November 7, 2014, letter Plaintiffs say should have been referenced in the City's 6/9/14 brief is (1) outside the pleadings in this case, (2) written five months after the City's 6/9/14 motion and brief, and (3) not relevant to the issues in this case.

Plaintiffs fail to disclose to this Court that Mr. Mermelstein actually sent two letters of complaint or requests for investigation to the Bureau of Construction Codes (BCC). One of them, dated October 27, 2014, pertained to the curb drains installed in the City's right-of-way as part of the City's storm sewer system, in particular those installed as part of the FDD program. The other, dated October 26, 2014, pertained to the City's FDD Ordinance and is attached as Exhibit K to Plaintiffs' 1/29/145 Brief. [18] An email from Mr. Mermelstein to Ralph Welton on October 27, 2014, is included as part of Exhibit L to Plaintiffs' 1/29/15 Brief. It opens by stating, "[t]he first complaint to the BCC on the retroactivity issue is attached," thereby confirming that at least one other complaint was in process. Further on in the email, he goes on to address the curb drains, which were the subject of the other complaint to the BCC. The BCC's response on

[18] Both this complaint letter and the other are argumentative, rambling and fairly incoherent, making it difficult to discern the actual nature of the questions, requests for investigation and/or complaints.

November 7, 2014,[19] is a combined response to Mr. Mermelstein's complaints (plural). It does not address every sentence or paragraph in the two complaint letters, but dismisses both as being outside the BCC's authority.

Nothing in the November 7, 2014, letter contradicts the City's factual and legal positions and arguments relative to the FDD program, the FDD ordinance, or the FDDs on the Plaintiffs' properties. By definition, work in the right-of-way is outside the scope of the Michigan Residential Code,[20] the Michigan Plumbing Code,[21] and the Michigan Building Code, which are limited to structures, including the water service, storm drainage and plumbing facilities. Although these codes, either individually or in combination, depending on the structure involved, address how and to where plumbing and stormwater facilities can discharge or connect outside the structure, none addresses or governs public facilities in the right-of-way.

But the City's brief, which is the subject of this motion for sanctions, was filed five months before the letter was written and could not have addressed it. The City also was not required to reference, explain or otherwise address the November 7, 2014, letter during oral argument on November 20, 2014.[22] If Plaintiffs think the letter is relevant to the arguments in this case, they can try to use it later for that purpose. In the meantime, it is and was irrelevant to the City's brief and arguments for summary disposition. The City cannot be faulted, never mind sanctioned, for not raising a non-issue before this Court.

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[19] Exh. J to Plaintiffs' 1/29/15 Brief.
[20] Section R101.2.
[21] Section 101.2.
[22] A party or an attorney is not given license to misrepresent or obfuscate to a court the law or the facts in a case simply because oral arguments are outside the scope of MCR 2.114. Nevertheless, Plaintiffs' claim that the City should have disclosed a document during oral argument, even though the document was not part of a pleading, is beyond the scope of a motion under MCR 2.114(E). Plaintiffs obviously did not think the letter was relevant or otherwise worth mentioning; they also did not raise it during the oral argument.

Plaintiffs misinterpret and misrepresent what the November 7, 2014, letter says. Mr. Mermelstein's October 26, 2014, complaint letter to the BCC (Exh. K to Plaintiffs' 1/29/14 Brief) raised issues as to enforcement of the City's FDD Ordinance.[23] The response, quite properly, was that the issue raised is outside the BCC's scope.[24] Yet Plaintiffs now try to convert that response to a baseless conclusion that the FDDs done at Plaintiffs' properties did not have to comply with plumbing and other requirements of the Michigan Residential Code or the Michigan Plumbing Code, including the prohibition against discharge of stormwater to a sewer system intended to carry only sanitary sewage.[25]

Plaintiffs go on in their 1/29/15 Brief (p. 15) to misrepresent, both bizarrely and without basis, things the City has allegedly said and done, all outside the record of this case and outside

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[23] Plaintiffs' arguments in their 1/29/15 Brief and Mr. Mermelstein's complaints to the BCC are, frankly, difficult to follow; the City responds to Plaintiffs' arguments to the extent they can be deciphered. The inability of counsel for Plaintiffs to understand the language of the applicable building codes, or to understand the words of a letter from the BCC, may raise questions regarding their representation of their clients, but their misunderstanding cannot be the basis for a motion for sanctions against the City and the City's attorneys.

[24] In his letter to the BCC, Mr. Mermelstein misrepresents that the City Attorney had taken the position that the applicable state building codes required the FDDs, but does not actually point to any such statements. As a very practical matter, had the plumbing code applicable to residential properties and in effect in 2001 required FDDs, the City would not have had to enact an ordinance to require them.

[25] Both the Michigan Residential Code and Plumbing Code define "sanitary sewer" as a "sewer that carries sewage **and excludes storm, surface and groundwater**." (Emphasis added.) Section 1101.3 of the Plumbing Code prohibits drainage of storm water "into sewers intended for sewage only." Both codes allow current code provisions to be applied to pre-existing structures if continued use of pre-existing plumbing systems poses a "hazard to life, health or property" (Plumbing Code Section 102.2), or "for the general safety and welfare of the occupants and the public" (Residential Code Section R102.7). Plaintiffs' arguments as to retroactivity also are irrelevant to this lawsuit, which is limited to claims for alleged uncompensated takings. As addressed on pages 2-3 of Ms. Elias's November 25, 2013, Memorandum (Exh. M to Plaintiffs' 1/29/15 Brief), a claim of improper retroactive application of a building code is a substantive due proves claim. A substantive due process claim is subject to a three year statute of limitations and cannot be part of Plaintiffs' lawsuit. MCL 600.5805(10) provides a three year limitation period for injury to a person or property, which applies to constitutional substantive due process claims. *Searcy v Oakland Cnty*, 735 FSupp2d 759, 765 (ED Mich 2010) (under Michigan law, that the statute of limitations is three years is well settled).

the bounds of this motion for sanctions, continuing most particularly the attacks against Ms. Elias that were begun by Mr. Mermelstein long before this lawsuit was filed.[26] The misrepresentations by Plaintiffs of the City's position and arguments are fabrications that are irrelevant to this motion, in addition to being malicious. It is unclear to what those attacks are even directed or why they even have been raised other than for harassment or other improper purposes.

Plaintiffs' ignorance of the scope of a motion under MCR 2.116(C)(8) falls on them and cannot be grounds for their baseless argument for sanctions against the City. The arguments in Point III of Plaintiffs' 1/29/15 Brief are not grounds for the relief they seek.

V. PLAINTIFFS' REQUEST FOR RELIEF[27] SHOULD BE DENIED

Plaintiffs' request for relief is as far-fetched as the arguments that lead up to it. They ask that they be protected "from a seeming attack by the City on the record of these proceedings."

The record in this case consists of the documents filed with the Court. To the extent discovery is taking place, deposition transcripts, documents produced, answers to interrogatories, and answers to requests to admit, affidavits and other testimony and evidence may be added to the record by either party to the extent warranted and appropriate. But Plaintiffs have identified nothing in the record that is an attack on them.[28]

A motion under MCR 2.114(E) must identify the document(s) filed by the non-moving

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[26] The attacks against the City Attorney's Office have continued. See, e.g., the second paragraph of Mr. Mermelstein's October 27, 2014, email to Ralph Welton, the City's Building Official, advising him that "[t]he City Attorney's Office is not your lawyer and if you bring them into this, I'm not responsible for the consequences." (Exh. L to Plaintiffs' 1/29/15 Brief.)

[27] Plaintiffs skip from Point III to their "Relief Requested," which they identify as Point V. They do not include a Point IV.

[28] The City hopes and assumes that Plaintiffs are not demanding that the Court order the City and its attorneys to agree with all the assertions and arguments made by the Plaintiffs through their attorneys. Although such a request would be a legally preposterous demand, the narrative in Plaintiffs' Point III seems to be a complaint that the City's attorneys do not agree with them.

party or attorney that violated MCR 2.114(D). Plaintiffs have identified none.

They also ask that they be able to brief the Court "as to further past instances of serious sanctionable conduct." Aside from the incoherence of that request, Plaintiffs had the opportunity in this motion to identify every filing they think violated MCR 2.114(D). They did not.

MCR 2.114(D) and (E) have a specific purpose. They are not written to provide a means to attack a party, its attorneys, or their positions on the facts and law in a case. A competent attorney can present admissible evidence and testimony, along with legitimately based legal arguments to refute the opposing party's arguments as to the facts and applicable law. Nothing the City and its attorneys have done in these proceedings has hindered Plaintiffs' ability to do that.

Plaintiffs' attorneys' attack on the City's attorneys under the guise of a motion for sanctions under MCR 2.114(E) does not serve the Court, the judicial process, or their clients, the Plaintiffs. It is evident from Plaintiffs' 1/29/15 Brief and the utter lack of factual and legal merit in their motion and arguments, that Plaintiffs[29] have brought this motion for improper purposes and to harass the City and the City's attorneys.

Plaintiffs, by this motion for sanctions, are not advancing this case, and are not acting in the interests of justice. Rather, they are wasting the City's and this Court's time for their own misdirected purposes. Plaintiffs' motion and the relief they request should be denied. The City also suggests that the Court may want to consider further action to curb the behavior of counsel

[29] The City reiterates that it considers Plaintiffs' attorneys, not the Plaintiffs, responsible for this motion and all statements and arguments that have been made and attributed to the Plaintiffs. If the Court were to decide on its own initiative to impose sanctions on Plaintiffs for this motion and their 1/29/15 Brief, it should be clear that the sanctions are imposed solely against Plaintiffs' attorneys and not against the Plaintiffs.

for the Plaintiffs in these court proceedings.[30]

CONCLUSION

This Court should deny Plaintiffs' Motion for Sanctions because it is without factual basis or legal merit, and should grant such other relief as is warranted and appropriate in the interests of justice.

Dated: February 6, 2015

Respectfully submitted,

By: _____

Stephen K. Postema (P38871)
Abigail Elias (P34941)
Attorneys for Defendant City
OFFICE OF THE CITY ATTORNEY

[30] Under MCR 2.114(E) the Court on its own initiative could find that this motion and briefs in support violate MCR 2.114(D) and impose sanctions based on the City's documentation of the costs it had to incur to respond to this frivolous and malicious motion and briefs. In addition, in *Maldonado v Ford Motor Co*, 476 Mich 372, 375; 719 NW2d 809 (2006), the Michigan Supreme Court affirmed "the authority of trial courts to . . . prevent abuses so as to ensure the orderly operation of justice."

EXHIBIT 1

STATE OF MICHIGAN

ATTORNEY GRIEVANCE COMMISSION

BUHL BUILDING
535 GRISWOLD, SUITE 1700
DETROIT, MICHIGAN 48226
TELEPHONE (313) 961-6585
WWW.AGCMI.COM

November 20, 2013

PERSONAL AND CONFIDENTIAL

Irvin A. Memelstein
2099 Ascot Rd.
Ann Arbor, MI 48103

RE: Irvin A. Memelstein as to Abigail Elias
AGC File No. 0351-13

Dear Mr. Memelstein:

Your complaint was filed with the Attorney Grievance Commission on February 12, 2013, alleging improper conduct on the part of Abigail Elias.

The undersigned investigated this matter by carefully reviewing all statements and documentation submitted by the parties. The results of the investigation, along with a recommendation, were submitted to the Commissioners for their review and decision.

The Attorney Grievance Commission determined that the evidence reviewed did not warrant further action by the Commission. Therefore, pursuant to MCR 9.114(A)(2), the Commission directed that this Request for Investigation be closed for the reason that the Attorney Grievance Commission does not issue legal opinions on prospective violations of the rules of professional conduct or review legal conclusions made by attorneys during the course of their business.

If I can be of further assistance to you, please do not hesitate to call.

Very truly yours,

Frances A. Rosinski
Senior Associate Counsel

FAR/mmp
cc: Abigail Elias

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STATE OF MICHIGAN

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November 20, 2013

PERSONAL AND CONFIDENTIAL

Irvin A. Memelstein
2099 Ascot Rd.
Ann Arbor, MI 48103

RE: Irvin A. Memelstein as to Stephen K. Postema
AGC File No. 0563-13

Dear Mr. Memelstein:

Your complaint was filed with the Attorney Grievance Commission on March 18, 2013, alleging improper conduct on the part of Stephen K. Postema.

The undersigned investigated this matter by carefully reviewing all statements and documentation submitted by the parties. The results of the investigation, along with a recommendation, were submitted to the Commissioners for their review and decision.

The Attorney Grievance Commission determined that the evidence reviewed did not warrant further action by the Commission. Therefore, pursuant to MCR 9.114(A)(2), the Commission directed that this Request for Investigation be closed for the reason that the Attorney Grievance Commission does not issue legal opinions on prospective violations of the rules of professional conduct or review legal conclusions made by attorneys during the course of their business.

If I can be of further assistance to you, please do not hesitate to call.

Very truly yours,

Frances A. Rosinski
Senior Associate Counsel

FAR/mmp
cc: Stephen K. Postema

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WASHTENAW

ANITA YU, JOHN BOYER, and
MARY RAAB,

Plaintiffs,

v.

CITY OF ANN ARBOR,

Defendant.
_____/

Case No. 14-181-CC

Hon. Timothy P. Connors

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(temporary admission under MCR 8.126)
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aelias@a2gov.org

_____/

PROOF OF SERVICE

I hereby certify that I e-mailed a true and correct copy of Defendant City of Ann Arbor's

Brief in Opposition to Plaintiffs' Motion for Sanctions Pursuant to MCR 2.114 and Amended Brief and this Proof of Service in the above entitled matter to the above-named counsel for the Plaintiffs this 6th day of February, 2015.

Dated: February 6, 2015

Alex L. Hammett, Legal Assistant