FILED
07/28/2023
Clerk of the
Appellate Courts

IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
April 18, 2023 Session

DANIEL HARVEY, ET AL. v. SHELBY COUNTY, TENNESSEE, ET AL.

Appeal from the Circuit Court for Shelby County
No. CT-002662-15 Rhynette N. Hurd, Judge

No. W2022-00683-COA-R3-CV

Plaintiffs filed this inverse condemnation suit against numerous defendants, alleging that their involvement with a construction project on an interstate highway resulted in increased surface waters and flooding of Plaintiffs' home and property. The trial court dismissed all of the claims at various stages of the litigation. In a prior appeal, this Court affirmed the dismissal of multiple claims, but we vacated the trial court's grant of judgment on the pleadings for two defendants because the trial court's order stated that its decision was based on "the entire record" and cited an exhibit to the complaint. *See Harvey v. Shelby Cnty.*, No. W2018-01747-COA-R3-CV, 2019 WL 3854297, at *4-6 (Tenn. Ct. App. Aug. 16, 2019). We remanded for consideration pursuant to Tennessee Rule of Civil Procedure 56. *Id.* at *6. After some limited discovery on remand, the trial court granted motions for summary judgment filed by the two remaining defendants. Plaintiffs appeal. We reverse and remand for further proceedings consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

CARMA DENNIS MCGEE, J., delivered the opinion of the court, in which J. STEVEN STAFFORD, P.J., W.S., and ARNOLD B. GOLDIN, J., joined.

Edward T. Brading, Johnson City, Tennessee, and Ryan Simatic, Minneapolis, Minnesota, for the appellants, Daniel Harvey and Portia Harvey.

Randall D. Noel, Gadson W. Perry, and Lauren N. Jones, Memphis, Tennessee, for the appellee, City of Memphis, Tennessee.

Ryan A. Strain and David L. Bearman, Memphis, Tennessee, for the appellee, Memphis Light Gas & Water Division.

OPINION

I. FACTS & PROCEDURAL HISTORY

This case has a lengthy procedural history dating back to 2015. Although the present appeal only involves one remaining claim for inverse condemnation against two defendants, the parties dispute whether certain findings and conclusions made by this Court with respect to another defendant now controls the issues in the present appeal. As such, we will recount the procedural history of the litigation regarding other defendants to the extent necessary to provide background for the parties' arguments on appeal.

Daniel and Portia Harvey live at 607 Harwood Cove in Memphis. Their property is located in Sweetbriar Woods Subdivision east of Interstate 240, and it borders the Tennessee Department of Transportation right-of-way. When Interstate 240 was constructed in the 1960s, a box culvert was constructed that runs underneath the interstate and carries surface water from the west side to the east side of the interstate. When the Sweetbriar Woods Subdivision was developed in the 1970s, another box culvert was constructed to receive surface water drainage exiting the Interstate 240 right-of-way. That culvert runs along Lot 2 of the subdivision. In the 1980s, the City of Memphis built a parallel section of pipe that also runs along the property line of Lot 2. A home was constructed on Lot 2 at a later date, and the Harveys began living at the property in 1997.

On June 23, 2015, the Harveys filed a complaint against the City of Memphis, Shelby County, and Memphis Light Gas and Water Division (MLGW),[1] alleging various claims in connection with flooding of their property. At the outset, the Harveys alleged that they had not experienced any flooding or drainage problems on their property for the first twelve years they resided there, from 1997 to 2009. However, the Harveys alleged that, "[a]round 2008, Defendants, their employees, agents, and/or independent contractors, commenced working on a major I-240/Walnut Grove Road roadway improvement project," and the Harveys' property was severely flooded for the first time on or about August 18, 2009. According to the complaint, "[t]he Harveys gave Defendants notice of this flooding." The Harveys alleged that they had extensive talks with Defendants and the State of Tennessee "about the flooding and surface water drainage problems," and "Defendants represented that the Work was ongoing and that they were studying and working on potential solutions to such problems[.]"

The complaint alleged that, "[a]round 2011," Defendants "commenced working on a major highway widening and improvement project" on the Interstate 240 corridor, and

[1] MLGW owns, or holds right-of-ways and easements on, certain parcels of real property located on the west side of the Interstate 240 corridor, where it operates and maintains electrical transmission towers and gas lines.

such work continued "for years." The Harveys alleged that Defendants not only graded in the area and widened the interstate but also constructed a "detention basin" upstream of the larger culvert that crosses underneath Interstate 240 and discharges immediately upstream of the culvert that runs around the Harveys' property. They alleged that the detention basin was negligently designed and constructed and that it does not adequately detain surface water, and in fact, it had increased the flow and volume of surface water from Interstate 240 into the subdivision and the Harveys' property. Thus, the Harveys asserted that the work done by Defendants "caused large additional quantities of surface water to be collected during times of heavy rains" and channeled under Interstate 240 onto their property. The Harveys alleged that their home flooded for a second time on January 30, 2013, three years after the first flood. They alleged that they again gave "Defendants" notice of the flooding and had extensive talks with them about the flooding and drainage problems, with the Defendants representing that the work was ongoing and that they were studying and working on potential solutions. Specifically, the complaint stated that the City engaged an engineering firm to study the drainage problem and flooding issue and perform a storm water analysis for the area. The complaint alleged that this report, the "Fisher & Arnold" study, was completed on August 12, 2013. The report found that flooding of the Harvey Property would occur during a five-year storm event and that significant modifications were necessary to restrict the flows in a manner that would provide measurable protection for Lot 2.

The complaint alleged that the Harvey home flooded for a third time on June 29, 2014. According to the complaint, the Harveys again gave notice to Defendants, who had extensive talks with them and represented that the work was ongoing and they were working on potential solutions to the problems. The complaint stated that a neighborhood meeting was held on October 20, 2014, which was attended by neighborhood residents, three representatives of the City of Memphis Engineering Department, two representatives of MLGW, a representative of TDOT, and others. The complaint also described information Mrs. Harvey received in October 2014, January 2015, and February 2015, regarding land clearing and survey work that was being performed by the City to identify and implement solutions to the problem, computer modeling by the City's Engineering Department, and the hiring of a separate firm to perform an "overall basin study." The complaint further alleged that the Interstate 240 widening project "either still is not complete or was completed less than one (1) year prior to the filing of this Complaint [on June 23, 2015]." The complaint set forth five causes of action against the Defendants, but the only one relevant to this appeal is the claim for inverse condemnation pursuant to Tennessee Code Annotated section 29-16-123. The Harveys attached numerous documents to their complaint, including the Fisher & Arnold study, emails regarding work that continued thereafter, and other documents.

After the filing of the Harveys' June 23, 2015 complaint in circuit court, they filed claims for damages against the State of Tennessee before the Tennessee Claims Commission, similarly alleging that increased surface water flow from improvements to

Interstate 240 made by TDOT caused flooding of their home. These claims were filed on October 16, 2015. Before the Claims Commission, the State moved to dismiss the inverse condemnation claim based on the one-year statute of limitations. For such a claim, the landowner has "one year to commence his action after an injury to his property which reasonably appears to him to be a permanent injury rather than a temporary one." *Knox Cnty. v. Moncier*, 455 S.W.2d 153, 156 (Tenn. 1970). The Claims Commissioner denied the State's motion to dismiss, noting that the City had retained an engineering firm to try and formulate a solution, and work toward finding a solution "was ongoing in January and February 2015" as documented by the emails to Mrs. Harvey. The Claims Commissioner found that "[t]he fact efforts were being made to modify the drainage system existing in January and February 2015 refutes Defendant's contention the taking was permanent[.]" Thus, he found that the claim filed on October 16, 2015, within one year of those efforts, was not time-barred. The Claims Commissioner subsequently transferred the claims against the State to the circuit court for consolidation with the claims filed against the City, County, and MLGW.

In circuit court, Shelby County filed a motion to dismiss, or in the alternative, for summary judgment, on several grounds. The circuit court granted the motion, holding, among other things, that the statute of limitations had expired "on all Plaintiffs' claims that fall under the Governmental Tort Liability Act." It found that "pursuant to the provisions of Tenn. Code Ann. § 29-20-305(b) Plaintiffs' tort claims are time barred by the twelve (12) months statute of limitations." The court explained, "Plaintiffs admit in their complaint that they experienced, for the first time, extensive home and property damages allegedly due to severe flooding from heavy rains, on or about August 18, 2009[.] Plaintiffs didn't file their lawsuit until June 23, 2015."

Thereafter, the City and MLGW both filed motions for judgment on the pleadings pursuant to Tennessee Rule of Civil Procedure 12.03. They sought dismissal of the claims against them for the same reason the trial court had dismissed the claims against Shelby County – expiration of the statute of limitations. They asserted that the Harveys' claim accrued either in 2009 at the time of the first flood, in January 2013 at the time of the second flood, or in August 2013 upon completion of the Fisher & Arnold study.[2]

The State chose another path for seeking dismissal in circuit court. It filed a motion for summary judgment based on the statute of limitations, with numerous affidavits in support. First, it submitted the affidavit of a construction engineer who was the on-site project manager for the Interstate 240 widening project beginning in 2011. He stated that roadwork on that project commenced in 2011, and the plans for the project included

---

[2] As the City and MLGW acknowledged before the trial court, however, "[t]he GTLA does not apply to inverse condemnation claims." *Riverland, LLC v. City of Jackson Tennessee*, No. W2017-01464-COA-R3-CV, 2018 WL 5880935, at *11 (Tenn. Ct. App. Nov. 9, 2018); *see* Tenn. Code Ann. § 29-20-105 ("This chapter shall not apply to any action in eminent domain initiated by a landowner under §§ 29-16-123 and 29-16-124 nor be construed to impliedly repeal those statutes.").

construction of a detention basin on the west side of Interstate 240 across from the Sweetbriar Woods Subdivision. He stated that construction of the detention basin was completed in April 2012. The project manager stated that, to his knowledge, no representation was ever made to the Harveys or other residents that *TDOT* would or could take further action to address flooding in the area.

Next, the State submitted the affidavit of TDOT's Regional Director of Operations for West Tennessee, who had attended the neighborhood meeting on October 20, 2014, which was organized by an elected representative to discuss the flooding. The Director said that he did not make any representation during the meeting that TDOT would or could take further action to address flooding in the subdivision, and to his knowledge, no such representation was ever made to the Harveys. He attached to his affidavit an email in which he had personally corresponded with Mr. Harvey in July 2014, after the third flood of the Harveys' home and Mr. Harvey's report of it to TDOT. The Director had responded by stating:

> We do understand your concerns and realize this has been an ongoing issue. However, the project has not increased drainage onto this area. The Department involved the City of Memphis and MLGW in the early stages of development of this project and included the drainage basin West of I-240 on property owned by Memphis Light Gas and Water. The detention basin takes the runoff West of the project and reduces it, resulting in the flow of water that leaves the project in this area being less than the flow prior to construction.

The State also submitted an affidavit of TDOT's Operations Specialist Supervisor, who had conversations with the Harveys by telephone and email in 2013 and 2014 regarding the flooding of their property. Although he acknowledged these communications, he stated that he did not make any representations that TDOT would or could take further action to address the flooding, and to his knowledge, no such representation was ever made to the Harveys. Finally, the State submitted the affidavit of TDOT's Transportation Manager who oversaw the development of design plans for the Interstate 240 widening project. He described in some detail the issues that existed with the drainage system prior to the construction project, the efforts to ensure that the project would not worsen the flooding, and the construction of the detention basin as part of the Interstate 240 project. However, he likewise stated that to his knowledge no representation was ever made to the Harveys that TDOT would or could take additional action to address the flooding.

Based on these facts, the State argued that the Harveys knew or should have known that they had suffered a permanent injury to their property in 2013, at the time of the second flood, or in July 2014, after the third flood, and therefore, their inverse condemnation claim filed against the State in October 2015 was untimely. The State also filed a statement of undisputed material facts in support of its motion for summary judgment.

The Harveys filed a response to the motions for judgment on the pleadings filed by the City and MLGW, emphasizing that their claim for inverse condemnation did not accrue until they realized or should have realized that they had suffered a *permanent* injury. They noted that they did not experience any flooding from 1997 until the first flood in 2009, and they did not experience a second flood until 2013. The Harveys pointed to the allegations in their complaint that when they notified Defendants after the second flood, the City retained Fisher & Arnold to investigate the flooding problem, and the study recommended certain modifications to the construction project. The Harveys contended that they engaged in "protracted talks" with Defendants thereafter regarding how to remedy the problem. They asserted that the earliest their claim could have accrued would be in June 2014, the date of the third flood, and therefore, their June 2015 complaint against the City and MLGW was timely. The Harveys suggested that they had eventually filed suit in June 2015 when they "realized that defendants were either engaged in misrepresentation or were just not going to take the necessary action" to address the problem. The Harveys filed a separate response to the State's motion for summary judgment, again arguing that they "had no reason to believe their problem was a permanent one so long as they were being told in good faith that defendants were studying the problem and were in the midst of determining the right solution to correct the problem." However, the Harveys did not submit any evidence in response to the motion for summary judgment, nor did they respond to the State's statement of undisputed material facts.

After a hearing, the trial court entered an order granting the motions for judgment on the pleadings filed by the City and MLGW. The order stated, "Based on the arguments of counsel and the entire record in this action, the Court concludes that Plaintiffs have failed to state a claim upon which relief can be granted, and that their claims should therefore be dismissed under Tennessee Rule of Civil Procedure 12.03." With respect to the claim for inverse condemnation, the circuit court acknowledged that a property owner must file suit within one year after he or she realizes or should reasonably realize that the property has sustained an injury that is permanent in nature. *See Bobo v. City of Jackson*, 511 S.W.3d 14, 20 (Tenn. Ct. App. 2015). However, the court concluded that the Harveys knew or reasonably should have known that the injury to their property was permanent "in 2009, when the property experienced the first flooding incident, which Plaintiffs reported to Defendants, and in no event later than 2013, either at the time of the second flooding incident in January 2013 or upon completion of the Fisher & Arnold study in August 2013." Thus, the circuit court concluded that the claim accrued "no later than 2013," so the claim filed against the City and MLGW in June 2015 was untimely.

The circuit court entered a separate order granting the State's motion for summary judgment. The court found that the State filed a statement of undisputed material facts pursuant to Tennessee Rule of Civil Procedure 56.03, citing evidence in the record to show that the Harveys knew of a permanent injury when their property flooded for a second time in January 2013. The court noted that the Harveys did not respond to the statement of

undisputed material facts or submit evidence of any kind in response to the motion. Thus, the court found that the undisputed facts showed that the Harveys knew or should have known of a permanent injury to their property in January 2013, the date of the second flood. Therefore, the claim against the State, filed on October 16, 2015, was time-barred.

The Harveys appealed to this Court. On August 16, 2019, this Court issued its decision affirming the circuit court in part, vacating in part, and remanding for further proceedings. *Harvey v. Shelby Cnty.*, No. W2018-01747-COA-R3-CV, 2019 WL 3854297 (Tenn. Ct. App. Aug. 16, 2019). The dismissal of Shelby County was not at issue on appeal. *Id.* at *3 n.4. Thus, we began by reviewing the trial court's grant of the motions for judgment on the pleadings filed by the City and MLGW. *Id.* at *4. We explained that such a motion "involves the consideration of nothing other than what its title suggests; the motion requests that a court grant judgment based on the pleadings alone." *Id.* (quoting *Sakaan v. Fedex Corp., Inc.*, No. W2016-00648-COA-R3-CV, 2016 WL 7396050, at *5 (Tenn. Ct. App. Dec. 21, 2016)). "If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and *not excluded* by the court, the motion *shall* be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." *Id.* (quoting Tenn. R. Civ. P. 12.03) (emphasis added). The circuit court's order granting the motions for judgment on the pleadings expressly stated that the court's decision was based on "the entire record." *Id.* The order also directly cited to an engineering report attached to the complaint. *Id.* at *6. As such, we concluded that the court was required to convert the motion for judgment on the pleadings to a motion for summary judgment. *Id.* We vacated the order granting the motions for judgment on the pleadings and remanded "for consideration of this motion pursuant to the standards of Rule 56, and to give all parties a reasonable opportunity to present all material pertinent thereto." *Id.* We also stated that "any remaining issues regarding the City and MLGW are pretermitted." *Id.*

Next, this Court considered the trial court's order granting the State's motion for summary judgment. *Id.* at *7. Based on the evidence presented at the summary judgment stage, viewed in the light most favorable to the Harveys, we found it clear that they "knew of the permanent injury at least by June 29, 2014," the date of the third flood. *Id.* at *9. Notably, this was a different date than that utilized by the trial court in its analysis, as the trial court concluded that the claim accrued in January 2013, the date of the second flood. *Id.* at *3. However, this Court stated that we "express[ed] no opinion as to whether Plaintiffs had sufficient knowledge at any earlier date because it is not necessary to do so for purposes of this opinion." *Id.* at *9 n.8. The claim filed against the State on October 16, 2015, was time-barred. *Id.* at *9. Although the trial court had "relied on different facts than this Court in reaching its conclusion," the result was the same, so we affirmed the grant of summary judgment "although for different reasons." *Id.* at *10. In a footnote, we added,

> We also reiterate, the facts are largely taken from the complaint and statement of undisputed facts contained in the record. Many of the facts were undisputed for purposes of the State's "Motion for Summary Judgment." However, these facts should not be considered as conclusively established on remand, for purposes of the additional proceedings involving any other defendants.

Id. at *9 n.8.

Finally, we considered the Harveys' argument that the State should be equitably estopped from asserting a statute of limitations defense. *Id.* at *10. We concluded that the Harveys "failed to demonstrate that equitable estoppel should toll the running of the statute of limitations for their claim against the State." *Id.* at *11. The doctrine of equitable estoppel is premised on a defendant's wrongdoing. *Id.* We again pointed out that the Harveys failed to present any additional evidence in response to the motion for summary judgment. *Id.* at *10. As a result, there was no proof in the record that the State engaged in any conduct amounting to a false representation or concealment of facts or that it took steps to prevent or delay the filing of the complaint. *Id.* at *11. To the contrary, the undisputed facts indicated that the State never made any assurances or promises to the Harveys. *Id.* The Harveys conceded that no action was taken by the State to remedy the flooding problem, and TDOT officials denied that the project contributed to the flooding. *Id.* Accordingly, the Harveys had "provided no proof that the doctrine of equitable estoppel factually applies to the State." *Id.* The order granting summary judgment to the State was therefore affirmed. *Id.*

On remand, MLGW filed a motion for summary judgment, again asserting that the one-year statute of limitations had expired. MLGW maintained that the Harveys had knowledge of a permanent injury either at the time of the first flood in 2009 or at the latest in 2013, when the property flooded for a second time and the Fisher & Arnold report was completed. In support of its motion, MLGW submitted a declaration from one of its employees, a Lead Transmission Engineer, who attended the neighborhood meeting regarding the flooding. He stated that he did not recall speaking to the Harveys at the meeting other than greeting them, nor did he attempt to prevent or delay the filing of their complaint. He also stated that MLGW did not implement any solutions in response to the Fisher & Arnold study or take action to address the flooding, nor did it assure the Harveys that such action would or could be taken. MLGW also submitted a declaration from its Supervisor of Property Management and Survey, Keith Ledbury, who also attended the neighborhood meeting regarding the flooding. He likewise stated that he did not recall speaking to the Harveys other than greeting them, and he never tried to prevent or delay the filing of a complaint by the Harveys. Mr. Ledbury said that he spoke with Mr. Harvey once by telephone regarding the flooding of the property, but he did not assure him that action could or would be taken and instead referred him to TDOT. Mr. Ledbury also stated that MLGW did not implement any solutions in response to the Fisher & Arnold study or

take action to address the flooding, and it never assured the Harveys that such action could or would be taken. MLGW also filed additional documents, including one of the affidavits that the State had filed in support of its motion for summary judgment from an employee of TDOT.

The City of Memphis also filed a motion for summary judgment. However, it claimed that the Court of Appeals had already decided, for purposes of remand, that the Harveys knew of a permanent injury *at least* by June 29, 2014, the date of the third flood. The City also argued that this Court's opinion regarding the issue of equitable estoppel was controlling on remand. The City argued that both rulings were binding under the law of the case doctrine. However, because the Harveys had filed their complaint in circuit court on June 23, 2015, a few months before they filed notice of their claim against the State on October 16, 2015, the City acknowledged that it was necessary to decide on remand whether the Harveys knew or should have known of a permanent injury any earlier than June 29, 2014. (If the one year period began with the date of the third flood, June 29, 2014, the Harveys' complaint filed on June 23, 2015, was timely.) The City reiterated that the circuit court had previously found that the Harveys should have known of a permanent injury in 2009 when the property first flooded or in 2013 when the property flooded a second time and the Fisher & Arnold study was completed, although the Court of Appeals did not utilize the same dates in its analysis. The City asked the circuit court to reach the same decision again, taking into account the facts shown at the summary judgment stage. In support of its motion for summary judgment, the City filed several of the affidavits of TDOT employees that the State had filed in support of its motion for summary judgment.

Both the City and MLGW filed statements of undisputed material facts in support of their motions for summary judgment, and this time, the Harveys filed responses to those statements. They also filed a response to the motions for summary judgment, contending that they had "dozens of communications," from 2013 to 2015, documenting the City's desire to fix the flooding problem in coordination with MLGW. The Harveys argued that the City's actions during this time "did two things." First, they argued that the City's repeated statements that it was working toward remediating the flooding led the Harveys to believe that the flooding was not a permanent taking. Alternatively, the Harveys argued that the City's actions deterred them from filing suit because they were convinced that the City was going to fix the problem. Thus, according to the Harveys, it did not become reasonably apparent that the flooding was a permanent injury until 2015 when they filed suit. The Harveys' response to the motions for summary judgment described a lengthy timeline of events continuing through June 2015, which, they contended, led them to believe that the injury to their property was not permanent. The Harveys filed numerous documents in response to the motions for summary judgment. They filed an affidavit of Mrs. Harvey, describing her contact with various individuals after the floods, with over a dozen exhibits attached to the affidavit, consisting of emails and other documents. They also filed an affidavit of Mr. Harvey describing his communications with various individuals, and numerous emails and documents attached in support. In addition, the

Harveys filed an affidavit from their attorney, stating that 38 exhibits attached to the affidavit, consisting mostly of emails, were obtained from the City and from MLGW during discovery. The City and MLGW each filed a further reply in support of their motions for summary judgment.

After a hearing, the circuit court entered an order granting the motions for summary judgment filed by the City and MLGW. The trial court found that the record before the court supported "only one conclusion: based on the undisputed facts, Plaintiffs knew or reasonably should have known of a permanent injury to their property when it flooded in 2009, but certainly no later than August 2013 when they received the Fisher & Arnold Study." Because suit was filed in June 2015, the court found the Harveys' inverse condemnation claim was time-barred. Regarding the issue of whether equitable estoppel should toll the statute of limitations, the court found that no actions by the City would meet the elements required under the doctrine, and no suggestion was made that it should apply to MLGW. Thus, the court entered summary judgment in favor of both defendants. The Harveys timely filed a notice of appeal.

II. ISSUES PRESENTED

The Harveys present the following issues for review on appeal:

1. Did the Circuit Court err by taking the issue of the Harveys' reasonable knowledge away from the jury (as trier of fact), and holding, based on undisputed facts, that no reasonable trier of fact could conclude that the statute of limitations began running later than 2013?

2. Where Defendants were actively working with Harvey to fix the problem causing the flooding from 2013-2015, including producing studies of the flooding issue and possible solutions, were Defendants equitably estopped from asserting a statute of limitations defense during the period in which the City was affirmatively representing that it would fix the flooding issue?

3. Did the circuit court err in denying a motion to compel discovery that sought documentary and other evidence tending to show the date on which Harvey should have reasonably known the taking was permanent?

For the following reasons, we reverse the decision of the circuit court and remand for further proceedings.

III. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there

is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. "We review a lower court's decision on a summary judgment motion *de novo* with no presumption of correctness." *Lemon v. Williamson Cty. Sch.*, 618 S.W.3d 1, 12 (Tenn. 2021) (citing *Tatham v. Bridgestone Ams. Holding, Inc*., 473 S.W.3d 734, 748 (Tenn. 2015)). On appeal, we must "make a fresh determination about whether the requirements of Rule 56 have been met." *TWB Architects, Inc. v. Braxton, LLC*, 578 S.W.3d 879, 887 (Tenn. 2019) (citing *Rye v. Women's Care Ctr. of Memphis*, 477 S.W.3d 235, 250 (Tenn. 2015)). "The moving party has the ultimate burden of persuading the court that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law." *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 83 (Tenn. 2008) (citing *Byrd v. Hall*, 847 S.W.2d 208, 215 (Tenn. 1993)). However, "'the evidence must be viewed in a light most favorable to the claims of the nonmoving party, with all reasonable inferences drawn in favor of those claims.'" *Cotten v. Wilson*, 576 S.W.3d 626, 637 (Tenn. 2019) (quoting *Rye*, 477 S.W.3d at 286). "If the undisputed facts support only one conclusion and that conclusion entitles the moving party to a judgment, then the trial court's grant of summary judgment is affirmed." *In re Est. of Cone*, 652 S.W.3d 822, 826 (Tenn. Ct. App. 2022).

IV. DISCUSSION

"The chief difference between a condemnation claim and an inverse condemnation claim is that the former is initiated by a government entity while the latter is initiated by the landowner." *B & B Enterprises of Wilson Cnty., LLC v. City of Lebanon*, 318 S.W.3d 839, 846 n.6 (Tenn. 2010). The Tennessee Supreme Court has explained the concepts of takings and inverse condemnation as follows:

> The Tennessee Constitution states that "no man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor." Tenn. Const. art. I, § 21. This constitutional provision recognizes the governmental right of eminent domain. The government is prohibited, however, from taking property for private purposes and must pay just compensation when property is taken for public use. *See Jackson v. Metro. Knoxville Airport Auth*., 922 S.W.2d 860, 861 (Tenn. 1996). The Tennessee General Assembly has implemented this provision by its passage of eminent domain and inverse condemnation statutes. *See* Tenn. Code Ann. §§ 29-16-101 to 29-16-127 (2000 & Supp. 2002); 29-17-101 to 29-17-1202 (2000).
>
> "Inverse condemnation" is the popular description for a cause of action brought by a property owner to recover the value of real property that has been taken for public use by a governmental defendant even though no formal condemnation proceedings under the government's power of eminent domain have been instituted. *See Johnson v. City of Greeneville*, 222 Tenn. 260, 435 S.W.2d 476, 478 (1968). A "taking" of real property occurs when

> a governmental defendant with the power of eminent domain performs an authorized action that "destroys, interrupts, or interferes with the common and necessary use of real property of another." *Pleasant View Util. Dist. v. Vradenburg*, 545 S.W.2d 733, 735 (Tenn. 1977). Not every destruction or injury to property caused by governmental action, however, constitutes a taking under article I, section 21 of the Tennessee Constitution. *See Jackson*, 922 S.W.2d at 862 (citing *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980)). Tennessee courts have recognized two classifications of takings: physical occupation takings and nuisance-type takings. *See id.* at 862-63.
>
> Physical occupation takings arise when a governmental defendant causes either a direct and continuing physical invasion of private property or a destruction of a plaintiff's property rights. *See generally Ill. Cent. R.R. Co. v. Moriarity*, 135 Tenn. 446, 186 S.W. 1053 (1916); *Barron v. City of Memphis*, 113 Tenn. 89, 80 S.W. 832 (1904). The construction of a permanent improvement by a governmental defendant that diverts water from a stream onto private property and causes flooding is an example of a direct and continuing physical invasion of real property. *See Barron*, 80 S.W. at 832-33; *see also Jackson*, 922 S.W.2d at 862. We have held that such direct and physical invasions constitute a governmental taking when real property is either actually appropriated or the common and necessary use of the property is rendered impossible or seriously interrupted. *See Barron*, 80 S.W. at 832-33; *see also Jackson*, 922 S.W.2d at 862. . . .

Edwards v. Hallsdale-Powell Util. Dist. Knox Cnty., Tenn., 115 S.W.3d 461, 464-65 (Tenn. 2003).

"The inverse condemnation cause of action is codified at T.C.A. § 29-16-123[.]"[3] *Peterson v. Putnam Cnty.*, No. M2005-02222-COA-R3-CV, 2006 WL 3007516, at *4 (Tenn. Ct. App. Oct. 19, 2006). In order to set forth a prima facie case for inverse condemnation, the plaintiff must allege the following elements: "(1) a direct and substantial interference with the beneficial use and enjoyment of the property at issue; (2) the interference must be repeated and not just occasional; and (3) the interference must

---

[3] The statute provides, in pertinent part:

> If, however, such person or company has actually taken possession of such land, occupying it for the purposes of internal improvement, the owner of such land may petition for a jury of inquest, in which case the same proceedings may be had, as near as may be, as hereinbefore provided; or the owner may sue for damages in the ordinary way, in which case the jury shall lay off the land by metes and bounds and assess the damages, as upon the trial of an appeal from the return of a jury of inquest.

Tenn. Code Ann. § 29-16-123(a).

peculiarly affect the property at issue and result in a loss of market value." *Id.* (internal quotations omitted).

Tennessee Code Annotated section 29-16-124 provides a one-year statute of limitations for inverse condemnation claims. In *Knox County v. Moncier*, 455 S.W.2d 153 (Tenn. 1970), our Supreme Court applied this one-year statute of limitations to a claim for inverse condemnation. Coincidentally, *Moncier* also involved flooding that was allegedly due to construction of an interstate highway, so its discussion is particularly instructive here. *Id.* at 154. The plaintiff owned property just north of Interstate 40 in Knoxville. *Id.* at 155. It was the lowest point in the area and contained a sinkhole where water drained into an underground cavern. *Id.* The plaintiff had constructed a warehouse on the higher elevation of his property and a catch basin to aid in discharging the surface water. *Id.* Shortly after the plaintiff occupied his building in December 1962, grading began on Interstate 40. *Id.* In March 1963, during a heavy rain, water and mud washed onto the plaintiff's property at such a rate that the catch basin could not carry off the flow, and the first floor of the building flooded. *Id.* The plaintiff contacted the contractor who was building the interstate and the State Highway Department, which came upon the property, pumped out the water, reconstructed the catch basin, and installed additional tile. *Id.* For the next couple of years, some mud and debris washed upon the property, but the building was not flooded. *Id.* During this time, the plaintiff contacted the Highway Department "on numerous occasions," and State engineers promised to alleviate the conditions. *Id.* However, the Highway Department never "did anything further," other than inspect the property and confer with the plaintiff in regard to the water problem. *Id.* In January 1965, a very heavy rain occurred, and water rose above the first floor level of the warehouse. *Id.* The grading of the interstate had been completed in September 1964, but the pavement and other work was completed at a later date. *Id.*

According to the plaintiff, he sued Knox County on June 1, 1965.[4] *Id.* His complaint sought damages from flooding allegedly caused by the construction of the interstate highway on the basis that it changed the natural drainage of the watershed area. *Id.* at 154-55. His suit was filed within a year of the second flood, but more than a year after the first flood. *Id.* at 155. The question before the Supreme Court was whether the suit was barred by the one-year statute of limitations. *Id.* The Court explained that "[i]n determining what amounts to a 'taking' in a case and when the 'taking' is complete so as to give the landowner a cause of action and begin the running of the statute of limitations, the Court must look to the facts in the particular case under consideration." *Id.* at 156 (citing *Davidson County v. Beauchesne*, 281 S.W.2d 266 (Tenn. Ct. App. 1955)). Ultimately, the Court concluded that the "taking" of the plaintiff's property occurred in

[4] The initial lawsuit was apparently filed and voluntarily dismissed, so the suit at issue in *Moncier* was refiled pursuant to the saving statute. *Id.* at 155-56. It was not clear from the record whether the original suit was in fact filed on June 1, 1965, so the Court remanded for the circuit court to hear proof on that issue. *Id.* at 157. On a petition to rehear, however, the Supreme Court modified its opinion so as not to require a remand on that question. *Id.* at 158.

January 1965, the date of the second flood, rather than March 1963, the date of the first flood. *Id.* The Court noted that at the time of the first flood, only a small amount of the grading had been done, so "the evidence would not seem to indicate that such flooding originated from or was caused by the grading." *Id.* In addition, the Court noted that the plaintiff discussed the flooding with State engineers from 1963 until 1965, "and he was assured that the problem would be alleviated." *Id.* In fact, the State had reconstructed the catch basin after the first flood. *Id.* Thus, the Supreme Court determined that "during this time period, 1963 to 1965, Moncier reasonably assumed that any injury to his land was of a temporary nature." *Id.* According to the Court, "Plaintiff was justified in believing that no 'taking' had occurred until after January 1965." *Id.* It explained:

> [A]fter a substantial part of the construction was completed in September 1964, and subsequent flooding occurred in January 1965, plaintiff was then justified in assuming that such flooding constituted a permanent situation and not merely a temporary inconvenience. This was the first time that Moncier could be charged with knowledge that the injury to his property was permanent, thus constituting a 'taking.'
>
> We do not hold that a property owner can sit idly by and wait to commence his suit at any time which is convenient with him, thereby circumventing the purpose of the statute of limitations. What we do hold is that the onus is on the property owner to institute his suit within one year after he realizes or should reasonably realize that his property has sustained an injury which is permanent in nature. At that time the 'taking' occurs and the statute of limitations begins to run. In this case the injury which constituted the 'taking' took place in January 1965, when the flooding occurred after the grading and a substantial part of the other work on the Interstate were completed.

Id. Thus, the plaintiff had one year from the second flood to institute his lawsuit. *Id.*

More recently, the Tennessee Supreme Court has reiterated that a "taking" occurs for the purposes of Tennessee Code Annotated section 29-16-124 "when the 'injury to . . . property . . . reasonably appears . . . to be a permanent injury rather than a temporary one.'" *B & B Enterprises of Wilson Cnty., LLC*, 318 S.W.3d at 846 (quoting *Moncier*, 455 S.W.2d at 156). "Courts confronted with a defense predicated on the running of the statute of limitations in Tenn. Code Ann. § 29-16-124 must look to the 'facts in the particular case under consideration' to determine when the statute of limitations began to run." *Id.* (quoting *Moncier*, 455 S.W.2d at 156). "Landowners must be vigilant and must file their suit within one year after they know or reasonably should have known that a taking has occurred." *Id.* (citing *Osborne Enters., Inc. v. City of Chattanooga*, 561 S.W.2d 160, 166 (Tenn. Ct. App. 1977)).

This Court applied these principles in another flooding case involving road

construction in *Leonard v. Knox County*, 146 S.W.3d 589 (Tenn. Ct. App. 2004). There, a jury concluded that that the plaintiff's claim against the City of Knoxville was not barred by the one-year statute of limitations. *Id.* at 595. This verdict was challenged on appeal. *Id.* The complaint had been filed in December 1999. *Id.* at 596. The City pointed out that by December 1998, one year earlier, the plaintiff's house "already had been flooded nine times." *Id.* Thus, the City argued that the plaintiff either was aware or should have been aware at least one year earlier that the damage appeared to be permanent. *Id.* However, the plaintiff testified that the flooding began in August 1998, and thereafter, he complained to the State, the City, and a state senator, and he was told that the flooding would go away once the road construction was completed. *Id.* The plaintiff's girlfriend similarly testified that she was told by contractors, in May 1999, that as soon as the permanent road was completed, the problem would be fixed. *Id.* This Court compared the facts to those present in *Moncier*, stating that in both cases "the plaintiff was assured that the flooding would be remedied." *Id.* We concluded that the testimony of the plaintiff and his girlfriend that they were told as late as May 1999 that the flooding would be remedied once the project was completed constituted material evidence to support the jury's verdict that the statute of limitations had not expired. *Id.* at 596-97.

In *Peterson v. Putnam County*, 2006 WL 3007516, at *1, this Court applied the one-year statute of limitations for inverse condemnation claims in the context of a flooding case that was resolved via a motion for summary judgment. The facts showed that in 1982 the county highway department had installed a drain pipe under Lakeland Drive, where the plaintiffs' home was located. *Id.* The pipe carried surface water under Lakeland Drive and onto the plaintiffs' property. *Id.* Before it was installed, the plaintiffs wrote a letter to the highway department warning that the pipe would "send water gushing at greater force in one place and would destroy our lawn and make [an existing] sink[ ]hole widen even faster." *Id.* As predicted, immediately after installation of the pipe, the plaintiffs' yard began to flood after each rain. *Id.* The plaintiffs complained to the highway department and other county officials about the drainage problem, requesting the installation of another pipe to route the water to the sinkhole. *Id.* However, they were told that the highway department could not install the requested pipe because it was not allowed to work on private property. *Id.* The supervisor offered to get the requested pipe for the plaintiff at a discounted price, but the plaintiffs did not pursue that option. *Id.* Thus, "[t]he county took no action to remedy or address the plaintiffs' drainage problem and never assured the plaintiffs that the problem would be fixed." *Id.* At some point thereafter, the plaintiffs dug a ditch to divert the water, and the county supplied some rocks to line the ditch. *Id.* at *2. Still, in the mid-1980s, the plaintiffs were forced to remove approximately ten large trees due to water damage. *Id.* In the late 1980s, their concrete patio separated from the foundation of their house. *Id.* The plaintiffs continued to complain to the supervisor and county officials during the 1980s and 1990s, but they did nothing. *Id.* In December 2001, the plaintiffs noticed structural damage inside their home, and in 2002, they filed suit for inverse condemnation, claiming that installation of the drain pipe led to the damage to their land and house. *Id.* The trial court granted the county summary judgment, holding that

the plaintiffs' inverse condemnation claim was barred by the statute of limitations. *Id.* at *3.

On appeal, the pivotal question was "when the plaintiffs knew or should have known that their property had suffered permanent injury as a result of the county's actions." *Id.* at *7. This Court concluded that "by the mid-1980s, the plaintiffs knew or should have known that the damage caused by the county's installation of the 24-inch drain tile was permanent." *Id.* By that time, the flooding had forced the plaintiffs to remove ten trees, and they had consulted with geologists to evaluate how to remedy the problem. *Id.* We also recognized that "[t]he county never assured the plaintiffs that their damage was temporary or would be alleviated." *Id.* The plaintiffs argued on appeal that the issue should have been a factual determination reserved for a jury. *Id.* at *8. We acknowledged that "[t]he accrual of a cause of action is a question of fact to be determined by the trier of fact when 'the evidence is conflicting or the time is not clearly provided and is a matter of inference from the testimony.'" *Id.* (quoting *Osborne*, 561 S.W.2d at 165). "If, however, the evidence is undisputed and only one conclusion can be reasonably drawn from it, the accrual of a cause of action is a question of law to be determined by the court." *Id.* We found that "only one conclusion" could be drawn from the evidence before us – "the plaintiffs' inverse condemnation claim filed on October 18, 2002, some 20 years after the installation of the drain tile and a number of years after the events of the 1980s and 1990s, was not brought within a year of the plaintiffs' knowledge that their property had sustained permanent injury." *Id.*

In the case at bar, the trial court found, just as it did prior to the first appeal, that the record before it supported "only one conclusion: based on the undisputed facts, [the Harveys] knew or reasonably should have known of a permanent injury to their property when it flooded in 2009, but certainly no later than August 2013 when they received the Fisher & Arnold Study." Because suit was filed in June 2015, the court found the Harveys' inverse condemnation claim was time-barred. Thus, we will examine the timeline of relevant events, based on the facts in the record before the trial court on remand at the summary judgment stage.[5]

[5] On appeal, the City repeats its argument that this Court's ruling from the first appeal regarding when the Harveys knew of a permanent injury is the "law of the case" for purposes of this appeal. We disagree. As we emphasized in the first appeal, the facts we discussed therein were "largely taken from the complaint and statement of undisputed facts contained in the record," as "[m]any of the facts were undisputed for purposes of the State's 'Motion for Summary Judgment'" because the Harveys did not submit any evidence in response to the State's motion or respond to the State's statement of undisputed facts. *Harvey*, 2019 WL 3854297, at *9 n.8. We specifically stated that "these facts should not be considered as conclusively established on remand, for purposes of the additional proceedings involving any other defendants." *Id.* Inexplicably, the City argues that "the record in this second appeal is largely unchanged from the first" and "[t]here are no new facts at all." This statement is perplexing because, on remand, the Harveys submitted numerous documents in response to the motions for summary judgment filed by the City and MLGW, including affidavits of Mr. Harvey, Mrs. Harvey, and their counsel, with dozens of emails and other documents attached. They also responded to the statements of undisputed

According to the affidavits of Mr. and Mrs. Harvey, they began residing at the property at issue in 1997. Both stated that when their property flooded for the first time, on August 18, 2009, they were concerned about the flooding and reported it to Defendants, but they did not believe the flooding to be a regular occurrence because it was the first flood they had experienced in twelve years of living there. The City concedes that the Harveys experienced no flooding or drainage problems from 1997 to 2009. According to the Harveys' affidavits, they believed the first flooding of their home was an isolated event, and they did not experience another flooding event for nearly four more years. Considering these facts, we cannot agree with the trial court's initial finding that the record only supports one conclusion -- that the Harveys knew or reasonably should have known of a *permanent* injury to their property when it flooded for the first time in 2009. A reasonable person could reach the opposite conclusion based on this record. Summary judgment should not be granted "when more than one conclusion can be reasonably drawn from the facts." *King v. Betts*, 354 S.W.3d 691, 711 (Tenn. 2011).

We must continue to review the relevant timeline of events due to the trial court's alternative finding that the Harveys knew or should have known of a permanent injury "no later than August 2013 when they received the Fisher & Arnold Study." According to Mr. Harvey's affidavit, he learned in 2011 that Interstate 240 was being reconstructed in the vicinity of his property, so he contacted an engineer who was employed by the contractor involved with the project.[6] The engineer informed Mr. Harvey that the design plan for the

---

material facts. Accordingly, the record is dramatically different than that before this Court in the first appeal.

We note that MLGW summarily states that the record contains "inadmissible hearsay that the Court should not review in deciding whether the Circuit Court properly granted MLGW's Motion for Summary Judgment." However, it does not cite to any legal authority to show that any particular email or document was in fact inadmissible hearsay. As such, the argument, to the extent it was made, is waived. *See Sneed v. Bd. of Pro. Resp.*, 301 S.W.3d 603, 615 (Tenn. 2010) ("It is not the role of the courts, trial or appellate, to research or construct a litigant's case or arguments for him or her, and where a party fails to develop an argument in support of his or her contention or merely constructs a skeletal argument, the issue is waived.").

[6] It is not entirely clear from the record whether there was construction on Interstate 240 at or around the time of the first flood in 2009. The Harveys' complaint had alleged that "[a]round 2008" Defendants "commenced working on a major I-240/Walnut Grove Road roadway improvement project," and "[a]round 2011," they "commenced working on a major highway widening and improvement project on the I-240 corridor." Several affidavits reference the widening project for which roadwork began in 2011. However, after the remand from this Court, the City argued in its motion for summary judgment:

> Proper consideration of the narrow issue before the Court, the timing of Plaintiffs' claim, requires putting aside some basic deficiencies revealed by the undisputed facts. For example, it is clear, now that those facts can be considered, that the I-240 Project could not have caused or contributed to Plaintiffs' 2009 flooding incident because construction on the project did not start until 2011.

The statements of undisputed facts filed by the City and by MLGW stated that TDOT began developing

project included a detention pond for runoff from Interstate 240. According to Mr. Harvey, "[a]fter hearing that, I continued to believe that the 2009 flood was a 'one-off' event in a heavy storm, and not something that would be reoccurring on my property." The detention basin was completed in April 2012. The Harveys' property flooded for a second time on or around January 30, 2013. The Harveys contacted Defendants to report the flooding. Within two weeks, on or about February 12, 2013, an engineer for the City told Mr. Harvey that the fix to the Harveys' flooding problem might be "as easy as restricting the water with a metal or concrete plate under the expressway, leading to our property." According to Mr. Harvey, the engineer told him that "the fix would be likely because it could happen without much money." This engineer also told Mr. Harvey that the detention pond was "in place" but "not working as it could."

Also after the second flood, due to the "continued flooding events" resulting in damage to the Harveys' home, the City engaged Fisher & Arnold "to perform a storm water analysis to determine the potential for improvements to [the] existing detention basin." This report was dated August 12, 2013. It states that Fisher & Arnold was tasked with preparing a report making recommendations of proposed modifications to the existing detention basin in "hopes of mitigating the flooding issues" in the Sweetbriar Woods Subdivision. The report explained that when the subdivision was developed in the 1970s, a certain type of culvert was used based on standards now known to be substandard. Due to "frequent storm events in which the existing culvert was overtopped and storm water crossed overland over Lot 2," the City constructed a parallel section of pipe in the 1980s to add additional conveyance capacity. The report stated that the detention basin was constructed by TDOT in 2012 "to address increased runoff from the expansion of I-240, but was not designed to address the historic flooding which has occurred in the Sweetbriar Woods subdivision." The "primary consideration" of the Fisher & Arnold report, it stated, was to explore the potential for expanding and/or modifying the detention basin to further restrict the outflow "and perhaps mitigate or at least reduce the degree of flooding which occurs in the Sweetbriar Woods subdivision." The report established the 5-, 10-, 25-, 50-, and 100-year storm event peak flows entering the culvert under Interstate 240 and draining

---

design plans in 2001 to improve the I-240 corridor and entered into an agreement with an engineering firm to develop design plans for the project in 2006. The Harveys agreed that these facts were undisputed. **(id)** The City's statement of undisputed facts further stated that construction began on the I-240 project in 2011, and the Harveys agreed that this fact was undisputed. However, MLGW's statement of undisputed facts stated that "[t]he Harveys allege work commenced on an I-240/Walnut Grove roadway improvement project around 2008." In response, the Harveys agreed that their complaint contained this allegation, but they disputed the "substance" of this statement based on the State's affidavit indicating that construction began in 2011. MLGW has insisted that the Harveys should be held to the allegation in their complaint because it was not amended or withdrawn. *See Bobo*, 511 S.W.3d at 26 n.13 ("Factual statements in pleadings are conclusive against the pleader in proceedings in which they are filed unless amended or withdrawn."). At the same time, the City continues to argue on appeal that "the I-240 Project could not have caused or contributed to Appellants' 2009 flood because construction on the project did not start until 2011, which Appellants now admit." Regardless of this dispute, a reasonable person could conclude that the Harveys did not know or have reason to know of a permanent injury in 2009.

into the subdivision. The models indicated that flooding of the Harveys' yard would occur even in a five-year storm event. The 10-year storm event, which was "the typical City of Memphis storm event for subdivision drainage system," would result in even greater peak flows. Thus, the report stated, "Obviously some significant modifications arc necessary to restrict the flows to a reduced rate that would provide measurable protection for Lot 2."

The report explained that the presence of MLGW transmission towers near the detention pond presented some barriers to expanding it or working around it. The study first set forth a proposal for "Scenario No. 1 improvements," with a probable construction cost of $220,000. With the improvements proposed per Scenario 1, "flooding of Lot 2 would not occur until a storm event greater than the 50-year storm event," and "actual flooding of the home on Lot 2 would not occur even during the 100-year storm event." Even during a 100-year storm event, there would only be "minimal overtopping" and some "passive path" overland flow. The report noted that one "issue" associated with the Scenario 1 improvement was that it would require grading in closer proximity to MLGW's transmission tower than it "customarily allowed." Still, the report reiterated that "Scenario No. 1 would for all practical purposes provide flood protection of Lot 2 up to and including the 100-year storm event."

The report also included a proposed "Scenario No. 2" at a cost of $244,000. However, the additional impact of Scenario No. 2 was found to be "negligible" compared to Scenario No. 1, at a greater cost. As such, Fisher & Arnold did not recommend the additional work required for Scenario No. 2. In closing, the Fisher & Arnold report stated that "[i]f MLG&W is agreeable to the proposed raising of the service path and associated improvements for Scenario No. 1, Fisher & Arnold, Inc. recommends the City of Memphis proceed with final design, as these improvements would significantly reduce the peak flows entering into the Sweetbriar Subdivision." The Harveys were provided with a copy of the Fisher & Arnold study in August 2013.

Again, the trial court held that the record supports "only one conclusion" -- that the Harveys should have known of a permanent injury to their home "certainly no later than August 2013 when they received the Fisher & Arnold Study." We disagree. Viewing the evidence in the light most favorable to the Harveys, we cannot say that a reasonable person could reach only one conclusion. As the City concedes in its brief on appeal, "[t]he City told Appellants that it was working on potential solutions for the flooding." In response to the second flood of the Harveys' home, the City commissioned the Fisher & Arnold study, which recommended that the City "proceed with final design" of its proposed Scenario No. 1, which would "for all practical purposes provide flood protection of Lot 2 up to and including the 100-year storm event." There is nothing in the record to show that the Harveys were ever informed that these solutions were not being pursued thereafter. To the contrary, the record contains an email from Fisher & Arnold to a City engineer in January 2014 containing a sketch of a "proposed adjustment in the improvements to the detention basin." The email states that MLGW had some "issues" with certain details of the plan

that would encroach on its transmission tower, so Fisher & Arnold was making some changes that would permit the service area to "remain as is without new grading" but "still result in significant decrease of the downstream flows." Mr. and Mrs. Harvey stated in their affidavits that when dealing with the City in 2013 and 2014, they did not know that the flooding was permanent, they believed that the City was genuine in its responses, and they believed that the City would fix or alleviate the flooding. Given the City's response to the second flood, a reasonable person could reach more than one conclusion and determine that the Harveys "reasonably assumed that any injury to [their] land was of a temporary nature." *See Moncier*, 455 S.W.2d at 156.

The Harvey property flooded for a third time on June 29, 2014, and the record contains many emails exchanged thereafter and details about the neighborhood meeting that occurred after the third flood. However, the Harveys' complaint was filed on June 23, 2015, within one year of the third flood, so it is not necessary to consider them for purposes of determining the Harveys' knowledge at any *later* date. We note, however, that these additional documents further support a conclusion that the Harveys did not have reason to know of a permanent injury to their property *prior to* the third flood. In July 2014, Mrs. Harvey sent a copy of the Fisher & Arnold report to a city councilman and asked him the City's position on the Sweetbriar drainage issue and the status of their complaints. The city councilman directed his assistant to "tell her we are waiting to hear from engineering." According to Mrs. Harvey, at the October 2014 neighborhood meeting, a City engineer spoke and informed the attendees that the City had contracted with another firm to do a storm water analysis and was proceeding with an additional study to provide insight into a long-term solution for the Sweetbriar basin. In December 2014, Mrs. Harvey was informed by a legislative assistant to a state representative that he had consulted with the City engineer who spoke at the meeting and that "city surveyors have been working in the area and should be nearly complete with the field work," and the "next step will be to compile the surveying data to establish the topographic maps and elevation details" with engineers working to identify opportunities for improvements. Around this time, another city engineer emailed Mr. Harvey directly and told him that the City was currently conducting an "existing condition field study of the area" so that it could "proceed with possible and appropriate designs," and the City would coordinate with MLGW and TDOT for final design. In January 2015, the legislative assistant relayed additional information he had learned from city engineers, stating that the survey work had been completed and compiled in an electronic format for computer modeling of the drainage area to test benefits of different improvement scenarios. The engineers reportedly hoped "to find a solution that would provide the same level of protection as the [Fisher & Arnold] recommendations while being MLGW friendly." The email stated that if one of these solutions was shown to provide a significant benefit, the City "will work with MLGW and TDOT to get their buy in/approval," after which the parties would "do final design and prepare construction documents" and "bid for contractors." It stated, "We will be pursuing all promising mitigation measures." In addition, this message stated that the City had "come to agreement" with a firm on the fee for the overall basin study and was "in the process of

executing their contract." In March 2015, the legislative assistant followed up with the City's Senior Design Engineer, who responded by stating that the City had experienced some weather-related delays and was "nearing the end, but not there yet." As late as June 2015, City engineers continued to communicate with MLGW regarding proposals for the Sweetbriar Basin project. According to the Harveys, it was around June 2015 when they finally heard from the City that MLGW was not agreeable to the proposed City solutions.

Based on the record before this Court, at the summary judgment stage, more than one conclusion can reasonably be drawn from the evidence presented, precluding summary judgment. *See King*, 354 S.W.3d at 711 (stating that summary judgment is inappropriate "when more than one conclusion can be reasonably drawn from the facts"). We accordingly reverse the grant of summary judgment in favor of the City and MLGW. We do not reach the parties' alternative arguments regarding whether the statute of limitations should be tolled under the doctrine of equitable estoppel.

The final issue raised by the Harveys on appeal concerns a motion to compel discovery from the City, which the Harveys filed on remand. That motion is contained in the record before us. However, the record does not contain any order granting or denying the motion. The City's brief purportedly cites to an order denying the motion, but upon review, the cited "order" is a proposed order that was attached as an exhibit to a separate motion but is not signed by the trial judge or stamped as filed. Thus, it is not even clear from the record whether the trial court ever signed an order that would be effective pursuant to Tennessee Rule of Civil Procedure 58.

"When a party seeks appellate review there is a duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis of the appeal." *State v. Ballard*, 855 S.W.2d 557, 560 (Tenn. 1993) (citing *State v. Bunch*, 646 S.W.2d 158, 160 (Tenn. 1983)). "Where the record is incomplete and does not contain . . . portions of the record upon which the party relies, an appellate court is precluded from considering the issue." *Id.* at 560-61 (citing *State v. Roberts*, 755 S.W.2d 833, 836 (Tenn. Cr. App. 1988)). In the absence of any order in the record to review, we cannot consider the merits of this issue as it was not properly preserved for appeal. *See id.*

V. CONCLUSION

For the aforementioned reasons, the decision of the circuit court is reversed and remanded for further proceedings. Costs of this appeal are taxed to the appellees, the City of Memphis and Memphis Light Gas & Water Division, for which execution may issue if necessary.

____

CARMA DENNIS MCGEE, JUDGE