

STATE OF MICHIGAN
COURT OF APPEALS

LEE A. JOHNSTON, NEIL MCLAUGHLIN, JR.,
and RICHARD HLAVACEK,

UNPUBLISHED
February 24, 2004

Plaintiffs-Appellants,

v

ASHBY DRAIN DISTRICT, DOUGLAS ENOS,
and MIDLAND COUNTY,

No. 244454
Midland Circuit Court
LC No. 01-004039-CZ

Defendants-Appellees.

Before: Sawyer, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order that granted summary disposition to defendants under MCR 2.116(C)(10).¹ We affirm.

The underlying lawsuit involved a Freedom of Information Act (FOIA) request made to the drain commissioner for notes he prepared regarding the Ashby Drain. Despite the drain commissioner's refusal, the trial court ordered him to disclose some of the notes and it awarded attorney fees as sanctions to the prevailing plaintiffs. Midland County paid the sanctions and then charged the drainage district for the FOIA costs. Plaintiffs here allege that the drainage district is not the appropriate governmental entity to be responsible for payment of FOIA sanctions.

Sanctions for failing to prevail in defending a FOIA action are provided under MCL 15.240:

(6) If a person asserting the right to inspect, copy, or receive a copy of all or a portion of a public record prevails in an action commenced under this section, the court shall award reasonable attorneys' fees, costs, and disbursements. If the

¹ "A motion for summary disposition under MCR 2.116(C)(10) is properly granted if, there being no genuine issue of material fact, the moving party is entitled to judgment as a matter of law." *Mahnick v Bell Co*, 256 Mich App 154, 157; 662 NW2d 830 (2003).

person or public body prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorneys' fees, costs, and disbursements. The award shall be assessed against the public body liable for damages under subsection (7).

(7) If the circuit court determines in an action commenced under this section that the public body has arbitrarily and capriciously violated this act by refusal or delay in disclosing or providing copies of a public record, the court shall award, in addition to any actual or compensatory damages, punitive damages in the amount of \$500.00 to the person seeking the right to inspect or receive a copy of a public record. The damages shall not be assessed against an individual, but shall be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function. [MCL 15.240(6-7).]

The parties agree that the drainage district is a “public body,” MCL 280.5, MCL 15.232(d)(iii) and (iv), and that the drain commissioner, as an individual, is not personally liable for the sanctions, MCL 15.240(7). Therefore, sanctions must “be assessed against the next succeeding public body that is not an individual and that kept or maintained the public record as part of its public function.” *Id.*

The drain commissioner is an officer for the drainage district, not for the county. *Brooks v Oakland Co*, 268 Mich 637, 639; 256 NW 576 (1934). Furthermore, absent misfeasance or malfeasance, a drainage district is statutorily “responsible for and liable for all acts and defaults” of the drain commissioner. MCL 280.25. The parties agree that the relevant records were made by the drain commissioner on behalf of and pertaining to the drainage district. No misfeasance or malfeasance has been alleged in the *preparation* of those records. Although there is no evidence directly stating where the records were physically located, the drain commissioner was acting in his role as an officer of the drainage district, and therefore, the drainage district is the “public body . . . that kept or maintained the public record as part of its public function.” MCL 15.240(7). Under the FOIA, the drainage district is thus the appropriate “next succeeding public body” against which sanctions “shall be assessed.” *Id.*

Plaintiffs argue that, because the drain commissioner did not entirely prevail in the FOIA suit and, therefore, was found to have improperly refused to disclose the records, he committed misfeasance or malfeasance under the terms of the Drain Code. Under MCL 280.25, the drainage district would be statutorily exempt from liability for the drain commissioner’s allegedly wrongful act. However, the Drain Code does not determine liability for FOIA sanctions. The FOIA determines liability for FOIA sanctions, based on a determination of the “public body . . . that kept or maintained the public record as part of its public function.” MCL 15.240(7). The Drain Code establishes that the drainage district was the public body that is responsible for the FOIA sanctions because the notes concerned the district, not the county. The drain commissioner challenged the disclosure of his notes under FOIA and these notes pertained to the drainage district, not the county. The drain commissioner thus acted in his capacity as an officer for the drainage district in regard to the FOIA dispute over his notes.

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Richard A. Bandstra