STATE OF MICHIGAN

COURT OF APPEALS

PETER S. BOSANIC, JR., LISA KENDZIORSKI-BOSANIC, FRANKIE K. BOSANIC and RILEY K. BOSANIC by their next friend PETER S. BOSANIC, JR., MARK NORCROSS, MICHAEL and MARLENE STRAMPEL, ROBERT and JULIE GILBREATH, HEIDI HUNTER, DIRK FRAZIER, ROBERT and SHELLY MARSHALL, III, MARK A. and DANA M. KROMER, MATTHEW and CYNTHIA NIXON, STEVEN and MARY CLISCH, DANIEL L. and KARI K. ROY; and LUCAS ROY by his next friend KARI K. ROY,

Plaintiffs-Appellees,

v

MOTZ DEVELOPMENT, INC. d/b/a/ MOTZ HOMES, and THOMAS C. MOTZ,

Defendants/Cross-Defendants/ Third-Party-Plaintiffs-Appellees,

and

MOTZ REALTY CO.,

Defendant,

and

THE CLINTON COUNTY DRAIN COMMISSIONER, and THE PRAIRIE CREK-GUNDERMAN LAKE DRAIN DRAINAGE DISTRICT,

Defendants/Cross-Plaintiffs/Third-Party Plaintiffs-Appellants,

and

FOR PUBLICATION
December 4, 2007
9:00 a.m.

No. 271765
Clinton Circuit Court
LC No. 04-009795-NZ

CLINTON COUNTY ROAD COMMISSION,

Third-Party Defendant-Appellee,

and

STEPHEN-KEYES & ASSOCIATES, INC.,

Third-Party Defendant/Third-Party Plaintiff,

and

RONALD L. ENGER, P.E.,

Third-Party Defendant.

Before: Owens, P.J., and Bandstra and Davis, JJ.

BANDSTRA, J.

Plaintiffs seek compensation from defendant Clinton County Drain Commissioner[1] because of flooding that damaged their homes following an extraordinarily severe rainfall in May of 2004. They claim primarily that the drain system in their subdivision was seriously undersized, and that this resulted primarily from a failure, during the design process in the late 1990s, to appropriately measure the acreage near the subdivision from which water would flow into the system (the "tributary offsite acreage" [TOA]). The other defendants are the developer and its engineers who assisted in designing and installing the drain system. The drain commissioner had the statutory authority under the Drain Code, MCL 280.1 et seq., to review the plans and design of the drain system and allegedly failed to appropriately do so, resulting in the bad design. At issue on appeal is the drain commissioner's motion for summary disposition, which was denied by the trial court.

Defendant contends that summary disposition was warranted because the statute providing an exception to immunity, MCL 691.1417, does not itself provide a cause of action, and plaintiffs have not alleged any separate cause of action. Alternatively, defendant argues that plaintiffs have failed to state a valid claim as to the elements required under the statute (if it provides a cause of action). We conclude that defendant is wrong on the first issue (the immunity exception statute provides for a potential cause of action) but that defendant is correct with respect to the second issue (the statute's requirements are not satisfied under the facts

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[1] The drainage district at issue here, owned and operated by defendant drain commissioner, is also named as a defendant. All allegations of liability are against the commissioner alone and "defendant" herein refers to the commissioner.

alleged by plaintiffs). Thus, we reverse the order denying the drain commissioner summary disposition.

Basic Facts

The basic facts alleged by plaintiffs[2] can be summarized as follows:

- the drain system in the Creekside subdivision where they live is seriously undersized,
- one of the reasons for that defect was the failure of the developer to appropriately consider the size and impact of the TOA on that system when the system was designed and installed in the late 1990s,
- the drain commissioner had an obligation to review the various plans by which the drain system was designed and installed,
- the drain commissioner, while recognizing that the lack of appropriate measurement was a problem in the design process, failed to require the developer to properly measure the TOA and its impact but instead advised the developer to use an estimation approach that was improper,[3] and
- the resulting undersized drain system was a significant enough cause of the May 2004 flooding to allow plaintiffs to recover property loss damages from the drain commissioner.

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[2] Defendant's motion for summary disposition was based, in part, on MCR 2.116(C)(8) ("The opposing party has failed to state a claim on which relief can be granted.") For purposes of that argument, we accept plaintiffs' allegations as if they are true. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 508; 667 NW2d 379 (2003). Defendant further based its motion for summary disposition on MCR 2.116(C)(7) ("The claim is barred because of . . . immunity granted by law"), claiming governmental immunity. The arguments with respect to MCR 2.116(C)(7) and (8) somewhat conflate. Defendant's contention is really that plaintiffs have failed to state a claim on which relief can be granted [MCR 2.116(C)(8)] because, under the facts alleged, their claim is barred because of governmental immunity [MCR 2.116(C)(7)], the exception provision of MCL 691.1417 not being satisfied. Defendant further claimed that summary disposition was appropriate under MCR 2.116(C)(10), arguing that plaintiffs failed to establish genuine issues of material fact with respect to some of the elements of MCL 691.1417(3). We need not consider that argument on appeal in light of our conclusion that the trial court should have determined that the facts as alleged by plaintiffs failed to state a claim on which relief can be granted.

[3] Plaintiffs also allege that the drain commissioner made other, less substantial, mistakes in reviewing the drain system project, apart from the TOA issue. Our determination that plaintiffs' allegations fail to state a claim on which relief can be granted applies equally to all of the mistakes plaintiffs allege.

The Statutory Scheme

In pertinent part, the relatively recently enacted statute[4] plaintiffs rely upon to bring this action provides that:

> (2) A governmental agency is immune from tort liability for the overflow or backup of a sewage disposal system unless the overflow or backup is a sewage disposal system event and the governmental agency is an appropriate governmental agency. Sections 16 to 19 abrogate common law exceptions, if any, to immunity for the overflow or backup of a sewage disposal system and provide the sole remedy for obtaining any form of relief for damages or physical injuries caused by a sewage disposal system event regardless of the legal theory.
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> (3) If a claimant, including a claimant seeking noneconomic damages, believes that an event caused property damage or physical injury, the claimant may seek compensation for the property damage or physical injury from a governmental agency if the claimant shows that all of the following existed at the time of the event:
>
> (a) The governmental agency was an appropriate governmental agency.
>
> (b) The sewage disposal system had a defect.
>
> (c) The governmental agency knew or in the exercise of reasonable diligence should have known about the defect.
>
> (d) The governmental agency, having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect.
>
> (e) The defect was a substantial proximate cause of the event and the property damage or physical injury. [MCL 691.1417(2) and (3)].

To successfully bring an action, a plaintiff cannot merely satisfy subsection (2) but must, instead, establish all of the requirements of subsection (3). *Willett v Waterford Twp*, 271 Mich App 38, 49-50; 718 NW2d 386 (2006).

The statute defines a "defect" to mean "a construction, design, maintenance, operation or repair defect." MCL 691.1416(e). It defines "appropriate governmental agency" to mean a governmental agency that, at the time of a sewage disposal system event, owned or operated the portion of the system that allegedly caused damages. MCL 691.1416(b).[5] It defines "sewage

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[4] MCL 691.1417 was enacted effective January 2, 2002, and has generated scant case law analysis, none of which is very helpful on the issues presented, as discussed below. Plaintiffs do not argue that any other statutory exception to governmental immunity applies to this case.

[5] Defendant does not contest that it is an "appropriate governmental agency" because it became the owner and operator of the subdivision drainage system, pursuant to an agreement with the

(continued…)

disposal system event" or "event" to mean "the overflow or backup of a sewage disposal system onto real property." MCL 691.1416(k). It defines "sewage disposal system" to include "a storm water drain system" such as is at issue here. MCL 691.1416(j). Finally, it defines "substantial proximate cause" to mean "a proximate cause that was 50% or more of the cause of the event and the property damage or physical injury." MCL 691.1416(l).

In construing this statute, the "one basic principle that must guide our decision" is that "the immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed." *Pohutski v City of Allen Park*, 465 Mich 675, 689; 641 NW2d 219 (2002), quoting *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000) (emphasis in original.)

Can MCL 691.1417 Itself Provide a Cause of Action?

The drain commissioner relies on an extremely strained reading of MCL 691.1417 to contend that the statute does not itself provide plaintiffs any cause of action but, instead, some independent cause of action must be pleaded (and plaintiffs failed to do so). Specifically it relies heavily on the last five words of that subsection: "regardless of the legal theory." While the argument is difficult to comprehend or summarize, the contention is that the statute provides an exception to immunity if its requirements are satisfied, but only if there is some other legal theory upon which a claim for damages is based. In other words, defendant argues that the statute does not itself provide a cause of action.

A plain reading of subsection (2) itself does not support that conclusion and, when subsection (3) is also considered, that conclusion becomes even less tenable. Subsection (2) affirmatively and specifically states that the statute "provide[s] the sole remedy for obtaining any form of relief for damages or physical injuries caused by a sewage disposal system event." While perhaps not drafted as clearly as it could have been, subsection (2) can best be understood as stating that this statutory scheme replaces any other common law exceptions to immunity that might otherwise exist for sewer overflow or backup actions, regardless of the legal theory giving rise to those common law exceptions. In other words, this statute constitutes the only exception to governmental immunity legally recognized in Michigan with respect to these kinds of actions.

That the statute itself presents parties like plaintiffs here a potential cause of action is further evidenced by subsection (3). It clearly provides that a "claimant may seek compensation" if the listed requirements are satisfied. In sum, while some semantic challenges may exist, it is difficult to imagine a statutory scheme that more clearly provides a potential cause of action. See *Willett*, *supra* (applying MCL 691.1417 as itself providing a potential cause of action). Plaintiffs could seek damages under the statute if they stated valid claims as to its elements, the question to which we now turn.

Do Plaintiffs State a Valid Claim Under MCL 691.1417(3)?

As noted earlier, defendant does not contest that plaintiffs have stated valid claims as to a number of the elements found within MCL 691.1417(3). There is no argument that the May

(…continued)

developer under the Drain Code, MCL 280.433 ("a 433 agreement").

2004 flooding did not constitute an "event" covered by the statute. Defendant admits that, having entered into a 433 agreement by which it became the owner and operator of the Creekside drainage system prior to May 2004, it is "an appropriate governmental agency" under subsection (a). Defendant does not argue that the drainage system was not defective in its design, i.e., that it was not undersized, under subsection (b).

Defendant contends, however, that subsection (3)(d) of the statute cannot be satisfied because, under the facts as alleged by plaintiffs, defendant had no legal authority to repair the defect in the drainage system prior to the 2004 flooding of plaintiffs' homes.[6] Defendant relies on the scheme presented by the Michigan Drain Code, MCL 280.1 et seq. To fully comprehend defendant's argument in this regard requires a general understanding of the Drain Code, especially its provisions limiting how repairs of a drain system may be initiated and how the cost of repairs is to be allocated. Generally, the cost of any repair made to a drain system must necessarily be borne by persons who use the drain system. Thus, the statutory scheme can best be understood as balancing the potentially competing interests of drain system users worried about defects in drain systems, drain commissioners who might want to overbuild or over-improve a drain system, and tax/assessment payers who may not want to incur costs associated with such improvements.

Specifically, MCL 280.191 requires that, if a drain system presents a problem, at least five property owners within the drainage district must petition the commissioner in writing for a repair. [Alternatively, a similar petition can be filed by a city, village or township.] Once a petition has been filed, the statute provides that a three member "board of determination" must review the petition, and it requires procedures designed to protect the due process rights of affected persons. MCL 280.191; 280.72. The board makes a determination as to the necessity of a repair, MCL 280.72(3), and aggrieved persons who dislike the determination may seek review in circuit court, MCL 280.72a. If the determination is in favor of making a repair, the drain commissioner may undertake the project, and project costs are apportioned to persons and entities who benefit from it. MCL 280.151.

Considering this statutory scheme, we conclude that defendant's claim that it was without "the legal authority to . . . repair, correct, or remedy the defect" at or before "the time of the event" has merit. Prior to the "event," the May, 2004 flood, no petition had been filed and, of course, no board of determination decision directing defendant to "repair, correct or remedy" the problem in the drain system had been made. In the absence of those prerequisite actions, defendant had no authority to address the defect in the drain system. Although a petition for repair was ultimately filed by some of the plaintiffs and others, that occurred after, and as a result of, the flood; it certainly did nothing to empower defendant to take prior corrective action to prevent the flood.

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[6] Defendant also contends, under MCR 2.116(C)(10), that plaintiffs failed to establish genuine issues of material fact regarding whether defendant had sufficient knowledge of the defect, MCL 691.1417(3)(c), and whether the defect was a substantial enough proximate cause of the flooding under MCL 691.1417(3)(e). As noted earlier, we need not reach the merits of those claims.

In sum, the facts as alleged by plaintiffs do not establish that defendant drain commissioner had the legal authority to take any action to address the design defect that plaintiffs allege existed in the drain and contributed to the May, 2004 flooding.[7] Thus, plaintiffs failed to state a valid claim that the requirement of MCL 691.1417(3)(d) was satisfied, and the trial court erred in failing to grant summary disposition to defendant.[8]

We reverse and remand for entry of an order granting defendant that relief. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Donald S. Owens
/s/ Alton. T. Davis

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[7] We note that the statute does not seem to "fit" the facts as alleged by plaintiffs for other reasons as well. For example, the statute imposes liability on a governmental agency only for a failure to "repair, correct, or remedy" a defect. MCL 691.1417(3)(d). The allegations here are that defendant failed in its responsibilities overseeing the design and installation of the drain system. We question whether the Drain Code authority defendant had to oversee that process also gives rise to a duty or obligation for which defendant could be held liable. But even assuming it does, the immunity exception statute does not make defendant liable for unreasonably failing to prevent the creation of a design defect; it only imposes an obligation to reasonably "repair, correct, or remedy" an existing defect. In any event, we need not, and do not, decide the merits of this or any other statutory argument defendant could have, but did not make.

[8] In light of this determination, we need not consider the other arguments raised by defendant.