

community watch

MONITORING LEGAL ISSUES THAT AFFECT MICHIGAN MUNICIPALITIES

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Drain Commissioner Found Not Liable for Sewer Overflow Where the Commissioner had No Authority to Repair

By: Stephanie Simon Morita

In *Bosniac et al v Motz Development et al*, the Michigan Court of Appeals found the Clinton County Drain Commissioner was not liable for a storm sewer overflow because the Drain Commissioner did not have legal authority to repair the storm drain. The case was brought under the statutory exception to governmental immunity for sanitary and storm sewer back-ups and overflows.

The Plaintiffs alleged that flooding damaged their homes as a result of an undersized and incorrectly designed drainage system in their subdivision. The Drain Commissioner, under the Drain Code, had authority to review the plans and designs for the drainage system. The Plaintiffs alleged the Drain Commissioner failed to appropriately review the plan and designs.

The Drain Commissioner asked the trial court to dismiss the case for two reasons: 1) The statute providing the exception to governmental immunity, MCL 691.1417, did not in and of itself provide a cause of action and therefore the Plaintiffs needed to have alleged a separate cause of action; and 2) Plaintiffs did not meet the elements required for the exception to governmental immunity to apply. The trial court denied the Drain Commissioner's request for dismissal. The Court of Appeals considered the issues and reversed the trial court based upon the latter of the Drain Commissioner's two arguments.

The Court of Appeals found that MCL 691.1417, based upon a plain reading of the statute, does provide a cause of action, and no separate cause of action was required to have been pleaded by the Plaintiffs. The Court of Appeals then reversed the trial court because the Court of Appeals found that

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This Court of Appeals decision provides that a plaintiff does not have to state a separate cause of action in addition to alleging the elements required by statute in order to have a viable case under the exception to governmental immunity for sewer overflows and back-ups. However, the Court also makes clear that that each of the elements have to be met, and where a governmental unit does not have legal authority to repair, correct, or remedy an alleged defect prior to the overflow or back-up complained of, then the governmental unit cannot be held liable.

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the Plaintiffs did not meet the elements of the exception to governmental immunity statute to have a viable cause of action.

In reaching its holding, the Court of Appeals found that subsection (3)(d) of MCL 691.1417 had not been met because the Drain Commissioner did not have legal authority to repair, correct, or remedy the alleged defect. Under the Drain Code, and specifically MCL 280.191, before the Drain Commissioner has authority to repair, correct, or remedy the alleged problem, a petition signed by five property owners must be filed with the Drain Commissioner. Subsequent to the petition being filed, a Drainage Board determination was required to direct the Drain Commissioner to repair, correct or remedy the problem. In this case, no such petition had been filed prior to the flooding, and as a result there was no Drainage Board determination directing the Drain Commissioner to take action. Therefore, and according to the Court, the Drain Commissioner was not empowered to take corrective action prior to the flooding, and should not be held liable for a failure to do so.

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CONTACT US

Farmington Hills

30903 Northwestern Highway, P.O. Box 3040
Farmington Hills, MI 48333-3040
Tel: 248-851-9500 Fax: 248-851-2158

Mt. Clemens

94 Macomb Place, Mt. Clemens, MI 48083-5651
Tel: 586-465-7180 Fax: 586-465-0673

Lansing

6639 Centurion Drive, Ste. 130, Lansing, MI 48917
Tel: 517-886-1224 Fax: 517-886-9284

Grand Rapids

2025 East Beltline, S.E., Ste. 209, Grand Rapids, MI 49546
Tel: 616-285-0143 Fax: 616-285-0145

Champaign, IL

2919 Crossing Court, Ste. 11, Champaign, IL 61822-6183
Tel: 217-378-8002 Fax: 217-378-8003

www.secrestwardle.com

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CONTRIBUTORS

Municipal Practice Group Chair

William P. Hampton

Senior Editor

Steven P. Joppich

Editor

Erene Golematis

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