

IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

Judges Michael J. Kelly, E. Thomas Fitzgerald, and William C. Whitbeck

TOWNSHIP OF ELBA, a Michigan Municipal
Corporation,

Plaintiff-Appellee,

Docket No. 144166

and

DAVID L. OSBORN, individually and as Trustee
of the Osborn Trust, MARK CRUMBAUGH,
CLOYD CORDRAY, and RITA CORDRAY,

Intervening Plaintiffs-Appellees,

v

GRATIOT COUNTY DRAIN COMMISSIONER,

Defendant-Appellant.

REPLY BRIEF ON APPEAL – APPELLANT

ORAL ARGUMENT REQUESTED

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INTRODUCTION

The Gratiot County Drain Commissioner (the “Drain Commissioner”) offers the following reply to Plaintiffs-Appellees’ brief on appeal. The Drain Commissioner relies on his initial brief, which addressed the issues in detail, and which largely anticipated and addressed Plaintiffs-Appellees’ arguments. The Drain Commissioner’s avoidance of repetition and distraction¹ by not addressing certain of Plaintiffs-Appellees’ arguments in this reply should not be deemed to constitute an acceptance of any of those arguments.

ARGUMENT

I. THE COURT OF APPEALS HAS EFFECTIVELY AND IMPERMISSIBLY RE-WRITTEN PORTIONS OF THE DRAIN CODE.

The Court of Appeals concluded that where one petition is used for both drain maintenance and improvements under Chapter 8 of the Drain Code (requiring 5 signatures) and drainage district consolidation under Chapter 19 of the Drain Code (requiring 50 signatures), the petition must have 50 signatures, and since the petition to maintain, improve and consolidate the #181-0 Drain and its tributary drains (the “Petition”) did not have 50 signatures, it is completely invalid and void. *Elba Township v Gratiot County Drain Comm’r*, 294 Mich App 310, 328; 812 NW2d 771 (2011), *lv gtd* 812 NW2d 768 (2012) (Appendix 80a).

The Drain Commissioner previously explained why the Court of Appeals reversibly erred, including a detailed discussion of MCL 280.191, MCL 280.194 and MCL 280.441 (DC brief, pp 8-15).²

Plaintiffs-Appellees respond that MCL 280.194 consists of two sentences, and assert “the first sentence of section 194 does not reference section 191’s petition signature requirements”

¹ For example, Plaintiffs-Appellees’ brief contains a number of factual inaccuracies, which are ultimately irrelevant to legal analysis or self-correcting on review of the record.

² The parties’ prior briefs are cited in this reply as “DC brief” and “PA brief.”

(PA brief, p 19). To the contrary, the first sentence says: “In any petition filed under this chapter” MCL 280.194’s reference to “this chapter” plainly concerns Chapter 8 of the Drain Code (where MCL 280.191 and MCL 280.194 are located). Chapter 8’s petition requirements are set forth in MCL 280.191, which is the first section of Chapter 8. Plaintiffs-Appellees acknowledge “the second sentence is silent on the issue of petition requirements including signature requirements” (PA brief, p 19). Thus, the only reference to petition requirements in MCL 280.194 is a cross reference to MCL 280.191, with no reference at all to MCL 280.441 or Chapter 19 of the Drain Code.

Plaintiffs-Appellees contend that the “Court of Appeals correctly acknowledged that ‘Chapter 8 . . . contains no provisions allowing the Drain Commissioner to disregard the signature requirements contained in MCL 280.441’” (PA brief, p 20, quoting *Elba Township, supra*, 294 Mich at 327 (Appendix 80a)). This contention is specious because there is no reason for the Legislature to explicitly point out that this section should be disregarded, particularly where, as here, Chapter 8 contains its own signature requirement and does not reference MCL 280.441’s signature requirements in the first place, as discussed above (See also DC brief, pp 10-11).

Plaintiffs-Appellees contend that the Drain Commissioner’s interpretation reads “consolidation” into MCL 280.191 (PA brief, p 20). MCL 280.191 does not include the word “consolidation” because it need not do so. MCL 280.194’s reference to a Chapter 8 petition (*i.e.*, an MCL 280.191 petition), with no reference at all to MCL 280.441, is sufficiently unambiguous, and properly interpreted to mean that a single petition for drain work and drainage district consolidation only has to satisfy MCL 280.191’s five-person signature requirement.

The Drain Commissioner previously explained that the Court of Appeals apparently misunderstood drain terminology and proceedings, resulting in a decision that is contrary to the Drain Code and the public interest (DC brief, pp 11-13). Plaintiffs-Appellees do not, and apparently cannot, offer any contrary argument.

The Drain Commissioner further explained that even assuming that the Court of Appeals was correct that a Chapter 8 petition must have 50 signatures to include consolidation, the Petition at issue remained valid for maintenance and improvements under Chapter 8 (DC brief, pp 13-15). Again, Plaintiffs-Appellees do not, and apparently cannot, offer any contrary argument. It is therefore undisputed that the Petition satisfied MCL 280.191 for drain maintenance and improvements under Chapter 8. Accordingly, even if this Court were to uphold the Court of Appeals' decision that the Petition needed 50 signatures to include consolidation (which the Court should not do), the Court should reverse the Court of Appeals' further decision that the Petition is completely invalid, and hold the Petition is still valid under MCL 280.191 for drain maintenance/improvements. Plaintiffs-Appellees' tacit concession that the Petition is at least partially valid also affects Argument III significantly, as discussed below.

II. THE NOTICE OF THE BOARD OF DETERMINATION MEETING SATISFIED DUE PROCESS.

The Court of Appeals recognized that the Osborn Plaintiffs received the Notice of the Board of Determination Meeting (the "Notice"), and that the Notice satisfied all statutory requirements under the Drain Code; however, the Court went on to find that the Notice was inaccurate and therefore misleading, and therefore concluded that it violated the Osborn Plaintiffs' due process rights. *Elba Twp, supra*, 294 Mich App at 331-32 (Appendix 81a-82a).

The Drain Commissioner previously explained that the Notice was accurate and not misleading. The Court misinterpreted it, apparently due to a misunderstanding of Drain Code

terminology (*i.e.*, the difference between a drain and a drainage district) and procedure. The Notice only concerned a meeting to determine whether maintenance, improvements and consolidation were necessary – not a specific project as the Court of Appeals appears to have mistakenly believed. After the determination of necessity, the Drain Commissioner determined the scope of activities, and there were further proceedings concerning assessments to pay for them, with notice, an opportunity to be heard, and no complaint (DC brief, pp 16-27).

Plaintiffs-Appellees respond with conclusory assertions that the Notice was misleading, but do not dispute the Drain Commissioner’s explanation of why the Notice was accurate, nor do they attempt to support the Court’s flawed perception that the Notice was inaccurate (which was the basis for the Court’s finding that it was misleading and violated due process). Instead, Plaintiffs-Appellees again tacitly concede that the Court’s opinion is unsupportable, stating:

“Whether the appellate court correctly or incorrectly referenced the *districts* or *drains* within the *project* in its determination that notice was misleading is not fatal to the appellate court’s conclusion.

* * *

“Even if the Court of Appeals mischaracterized the significance of the detailed description of township and section numbers referenced in the Notice as Defendant/Appellant suggests, it does not absolve the Notice of its misleading character or make the Court of Appeals’ finding regarding the misleading character of the Notice reversible error” (PA brief, pp 24-25, emphasis in original).

Plaintiffs-Appellees then attempt to persuade this Court to affirm the Court of Appeals’ result on alternative grounds, first suggesting that the Notice was misleading because it could have included more information (PA brief, pp 25). This suggestion is unpersuasive because it is undisputed that the Notice satisfied all statutory requirements, so there was no requirement for more information. Plaintiffs-Appellees also immediately abandon this suggestion by next asserting that the Notice was misleading because it included too much information, and that the

new “rule to be gleaned from the Court of Appeals’ decision is that where a drain commissioner provides extra-statutory information in the notice at his discretion, as here, such notice shall not be misleading under all the circumstances” (PA brief, p 26).

The question remains: Why exactly was the Notice supposedly misleading? Plaintiffs-Appellees never offer a coherent explanation. Instead, they simply quote the Notice, with the apparent hope that this Court will somehow misread it as the Court of Appeals did (PA brief, p 26). Plaintiffs-Appellees do not improve their position by relying on affidavits indicating that certain people misunderstood the Notice (PA brief, pp 26-28). The Notice was still accurate, as the Drain Commissioner explained previously and as undisputed by Plaintiffs-Appellees. The possibility that the Notice could be misread is not a sound basis for a due process claim. Plaintiffs-Appellees’ proposed rule allowing a cause of action based on the possibility of subjective error, when the underlying document is accurate and satisfies all statutory requirements, could also have wide-ranging detrimental impacts beyond this case.³

Moreover, the affidavits are factually inaccurate and legally incorrect on their face in asserting, for example at paragraph 8, that each affiant allegedly believed he or she was misled, and “that my rights as a property owner and tax payer were violated in that I did not receive proper notice regarding the purpose of the May 4, 2010 meeting which resulted in my property being included for assessment in a new drain district” (Appendix 36b, 44b, 56b59b, 62b, 65b, 68b, 71bv, 74b, 77b, 80b, 83b, 86b, 89b, 92b, 95b, 98b, 101b). Regardless of what the affiants may believe (assuming for argument’s sake that they believe the form statements they signed), there is no property interest that could support a due process claim here, since consolidation, in

³ For example, in contract law: “One who signs a contract cannot seek to avoid it on the basis that he did not read it or that he supposed that it was different in its terms.” *Nieves v Bell Industries, Inc*, 204 Mich App 459,463; 517 NW2d 235 (1994).

itself, is a hold-harmless event financially; the Notice concerned the necessity of drain work, and not any specific drain project; and the Notice also did not concern drainage district assessments, which were addressed in later proceedings that satisfied due process and are undisputed, as discussed above and explained previously in detail (DC brief, pp 19-21, 23-27).

The Drain Commissioner further explained that the Osborn Plaintiffs' due process claim was also properly dismissed because they actually received the Notice (which is undisputed), and they knew (or are at least deemed to know under controlling case law) that the Notice concerned them because their properties were subject to prior drainage district assessments (DC brief, pp 27-29). Plaintiffs-Appellees' response boils down to a contention that the Notice should have referenced the "#181-0" drain rather than the "#181-10" drain (PA brief, pp 27-30).⁴ This contention is, at most, merely a technical objection that cannot support the Court of Appeals' decision.⁵ The Drain Commissioner respectfully asserts that this Court should reverse the Court of Appeals through an opinion following the largely undisputed law and analysis set forth in his initial brief.

III. THE COURT OF APPEALS CHANGED OVER A HUNDRED YEARS OF SETTLED LAW IN HOLDING THAT THE TRIAL COURT HAD EQUITY JURISDICTION; THIS COURT SHOULD RESTORE THAT PRE-EXISTING LAW.

This Court's Order granting leave to appeal presented the question of "whether, as the Court of Appeals concluded, '[w]ithout the requisite number of signatures attached to the #180-0 Drain petition, the Drain Commissioner had no authority or jurisdiction to act on the petition,

⁴ The Notice printed "#181-10" because it was generated by commonly-used assessing software. The "10" references 2010, which was the latest year of assessment. The software did not exist in 1990, when the Osborn Plaintiffs' properties were first subject to assessment (Appendix 3a-8a).

⁵ *In re Fitch Drain No 129*, 346 Mich 639, 646-47; 78 NW2d 600 (1956). *See also, Oshtemo Twp v Kalamazoo Co Rd Comm*, 288 Mich App 296, 303-305; 792 NW2d 401 (2010) (discussing and applying the scrivener's error doctrine of statutory construction).

and the proceedings establishing the No. 181 consolidated drainage district are void,' thus authorizing the circuit court to exercise equitable jurisdiction" (Appendix 89a, quoting *Elba Township, supra*, 294 Mich App at 341). The Drain Commissioner answered "no," explaining that the Court of Appeals changed over a hundred years of settled law that claims challenging Drain Code proceedings are strictly limited by statute, with a narrow equity exception only for claims that arise from fraud (which is not alleged here) or from a violation of the Constitution (which is not satisfied by mere failure to satisfy a statutory signature requirement). (DC brief, pp 29-35).

Plaintiffs-Appellees respond that (1) "Michigan courts are not divested of equity jurisdiction to consider Drain Code challenges," and (2) "divestiture of jurisdiction is accomplished under clear mandate of law" (PA brief, pp 30-31, citing *Romulus City Treasurer v Wayne Co Drain Comm'r*, 413 Mich 728; 322 NW2d 152 (1982)). Plaintiffs'-Appellees' reliance on *Romulus* is misplaced because (1) that case concerned fraud allegations⁶ that fall within the equity exception, but are not present here, and (2) it is undisputed that here the requirements of MCL 280.161 were not satisfied, and that statute plainly states:

"If no certiorari be brought within the [10 day] time herein prescribed, the drain shall be deemed to have been legally established, and the taxes therefor legally levied, and the legality of said drain and the taxes therefor shall not thereafter be questioned in any suit at law or equity."

Plaintiffs-Appellees then inaccurately assert that the Court of Appeals determined that equity jurisdiction may arise from due process violations (PA brief, pp 32-36), concluding with the inaccurate allegation that the Drain Commissioner "flatly ignores the due process violations

⁶ *Romulus, supra*, 413 Mich at 733, 736 ("Plaintiffs allege that defendants have committed a constructive fraud . . . We need not pass on the merits of this contention; we need only consider whether this is a claim that may properly be considered by a circuit court acting within its equitable jurisdiction").

stemming from the misleading notice” (PA brief, p 36). To the contrary, as the Drain Commissioner explained in his reply in support of his application for leave to appeal, the Court of Appeals plainly held that equity jurisdiction was based on an alleged violation of a statutory signature requirement, without any mention of due process. The Court’s Order granting leave to appeal similarly recognized that the Court of Appeals concluded that equity jurisdiction was based on the alleged violation of a statutory signature requirement, and directed the parties to address that conclusion. The Drain Commissioner followed the Court’s directive, explaining in detail why the Court of Appeals was wrong in effectively rendering MCL 280.161’s limitations period meaningless, and requesting that the Court restore the previously-settled law, as set forth in *Twp of Clarence v Dickinson*, 151 Mich 270, 272-73; 115 NW 57 (1908), that petition-signature defects are purely statutory, and therefore cannot constitute a Constitutional violation that could support equity jurisdiction. Again, Plaintiffs-Appellees’ efforts to distract this Court from the Court of Appeals’ unsupportable opinion are telling.⁷

Plaintiffs-Appellees’ final argument addresses the question that the Court presented, but with little analysis. Instead, they essentially contend that (1) if the Petition was invalid, then the Drain Commissioner did not have jurisdiction to proceed, and (2) the Petition was invalid because it did not comply with MCL 280.441’s requirement of 50 signatures (PA brief, pp 38-40).

The Drain Commissioner maintains that 50 signatures are not required for consolidation in a Chapter 8 project (as discussed previously), but even assuming for argument’s sake that the Petition was not valid for drainage district consolidation purposes under MCL 280.441, it was

⁷ A due process violation would of course be a Constitutional violation, but even if this Court were to consider Plaintiffs-Appellees’ alternative theory, there was no due process violation here, as discussed above and further explained in the Drain Commissioner’s initial brief.

still valid for drain maintenance and improvement purposes under MCL 280.191. Plaintiffs-Appellees do not dispute this point, as discussed above. Since the Petition that was at least valid for drain maintenance and improvements under MCL 280.191, the Court of Appeals' conclusion that the proceedings were void cannot be sustained.

For completeness, the Drain Commissioner further notes that Plaintiffs-Appellees' argument is not even supported by the three cases on which they rely. Plaintiffs-Appellees first rely on *Arnhem v Round*, 210 Mich 531, 536; 177 NW 985 (1920), where the Court stated: "By the filing of a valid application for the Brush Creek drain the commissioners acquired jurisdiction." The Court then added: "The extending the line of the drain upwards of three miles beyond the route described in the application did not make the drain proceedings void. The most that could be claimed for it is that it was an irregularity." Similarly, here there was at least a valid Petition for drain maintenance and improvements, and any irregularity is merely technical and cannot support the Court of Appeals' decision that the drain proceedings are void.⁸

Plaintiffs-Appellees next rely on *Kinnie v L. M. Bare, Twp Drain Comm'r*, 68 Mich 625; 36 NW2d (1888), where this Court rejected the assertion that a petition with five signatures was insufficient to confer jurisdiction. *Kinnie* therefore supports the Drain Commissioner's position.

Finally, Plaintiffs-Appellees rely on *Hinkley v Bishop*, 152 Mich 256, 261; 114 NW2d 676 (1908), where the Court rejected the argument the application was "void for want of signatures." Moreover, as may be relevant to the due process analysis, the Court also rejected the argument that the application did not properly describe the drain, since the application's general description was all that the law required. *Id.*

⁸ *In re Fitch Drain No 129, supra*, 346 Mich at 646-47. See also, *Bridgeport Twp v Saginaw Co Drain Comm'r*, 118 Mich App 334, 338-39; 324 NW2d 618 (1982) (holding that a petition with 5 signatures satisfied MCL 280.191's requirements where the nature of the project (inside diameter of the pipe) did not trigger the statute's higher signature requirements).

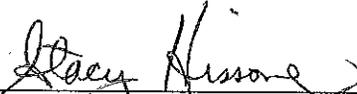
CONCLUSION AND RELIEF REQUESTED

The Court of Appeals' opinion cannot withstand reasoned analysis, as the Drain Commissioner has explained and supported extensively, and as Plaintiffs-Appellees further demonstrate through their inability to support the Court's reasoning. There is similarly no merit in Plaintiffs-Appellees' suggestions of alternative grounds to maintain the Court's results. Accordingly, the Drain Commissioner respectfully requests that this Court reverse the Court of Appeals' opinion (Appendix 72a -88a), and reinstate the Gratiot Circuit Court's March 8, 2011 order granting summary disposition in favor of the Drain Commissioner (Appendix 70a-71a) through an opinion that corrects and clarifies the law as discussed above and further explained in the Drain Commissioner's initial brief.

Respectfully submitted,

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