

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

CANNON TOWNSHIP, on behalf of and
additionally as assignee and subrogee of
Robert and Pamela Mack,

Plaintiff,

vs.

ROCKFORD PUBLIC SCHOOLS,

Defendant.

Case No. 12-09768-CZB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER DENYING DEFENDANT’S MOTION
FOR SUMMARY DISPOSITION AND GRANTING PLAINTIFF
LEAVE TO SUBMIT A FIRST AMENDED COMPLAINT

The Court presumes that Robert and Pamela Mack do not regard Defendant Rockford Public Schools (“RPS”) as a good neighbor. On August 20, 2011, while the Macks were out of town, East Rockford Middle School lost power and, as a result, its water-filtration system overwhelmed a local sewer line. That, in turn, forced an enormous amount of raw sewage into the Macks’ home, ruining nearly everything in the Macks’ finished basement. In the wake of the sewage back-up at their home, the Macks received \$5,000 – the policy limit for such a loss – from their own insurer. In addition, the local governmental body, Plaintiff Cannon Township, eventually stepped in to provide the Macks with \$50,000. But RPS has not paid a dime for the loss it caused, relying upon the statutory version of the hoary concept that “the king can do no wrong.” See Larson v Domestic & Foreign Commerce Corp, 337 US 682, 695 (1949). Indeed, RPS has moved for summary disposition, arguing that real-party-in-interest principles and governmental immunity foreclose this action aimed at obtaining some measure of compensation from RPS. The Court disagrees.

I. Factual Background

In requesting summary disposition, Defendant RPS has cited MCR 2.116(C)(4), (7), and (8). But it appears RPS meant to cite MCR 2.116(C)(5), which contemplates arguments that the plaintiff “lacks the legal capacity to sue[,]” rather than MCR 2.116(C)(4), which authorizes challenges to the Court’s “jurisdiction of the subject matter.” When addressing a summary-disposition motion under MCR 2.116(C)(5), a court “must consider the parties’ pleadings, depositions, admissions, affidavits, and other documentary evidence” See *In re Quintero Estate*, 224 Mich App 682, 692 (1997). Similarly, when faced with a request for summary disposition pursuant to MCR 2.116(C)(7), a court may review “affidavits, depositions, admissions, or other documentary evidence,” but the Court must accept allegations in the complaint “as true unless contradicted by documentation submitted by the movant.” *Maiden v Rozwood*, 461 Mich 109, 119 (1999). Finally, in reviewing a motion requesting summary disposition under MCR 2.116(C)(8), the Court must limit itself to the allegations set forth in the complaint. See *id.* at 119. Because RPS is more likely to obtain summary disposition if the Court reviews matters outside the four corners of the complaint, the Court shall use the complaint as the starting point in setting the factual background, and then adjust the allegations in the complaint based on evidence furnished by parties to decide whether RPS can prevail under MCR 2.116(C)(5) on its real-party-in-interest theory or MCR 2.116(C)(7) on its claim to governmental immunity.

Plaintiff Cannon Township operates a sewage collection and transportation system that serves the East Rockford Middle School and the downstream residence at 7459 Davies owned by Robert and Pamela Mack. See Complaint, ¶¶ 1, 6. On August 20, 2011, a power outage in the area caused a valve at the East Rockford Middle School’s water-filtration system to remain open, which resulted in “the filtration equipment . . . discharging water in a backwash mode” into the sewer system. See

Brief in Support of Defendant’s Motion for Summary Disposition, Exhibit 2 (Affidavit of James VanderKolk, ¶¶ 14-17). That discharge overwhelmed the sewer system, forcing a large volume of raw sewage into the Macks’ finished basement. See Complaint, ¶ 9.

When the Macks returned to their home on August 28, 2011, they found the damage that the sewage caused. See Plaintiff’s Brief in Opposition to Defendant’s Motion for Summary Disposition, Exhibit A (Robert Mack Deposition at 5). The Macks promptly submitted a claim to Auto-Owners Insurance Company, which immediately paid the Macks the entire \$5,000 policy limit for the event. See id. (Robert Mack Deposition at 8). The Macks received an additional \$50,000 from Plaintiff Cannon Township through its insurer, the Michigan Municipal League Liability and Property Pool (“MMLLPP”). See id., Exhibit B (Settlement Agreement, § 1). In exchange, the Macks assigned to Cannon Township their claim for sewage damages, including “all claims against Rockford Public Schools” related to the August 20, 2011, incident. As a result, Cannon Township stepped into the Macks’ shoes and initiated this action against Defendant RPS by filing a complaint on October 19, 2012. Approximately one year later, on October 21, 2013, Defendant RPS filed the motion seeking summary disposition that the Court must now resolve.

Defendant RPS has identified two entirely separate grounds for summary disposition. First, RPS argues that Plaintiff Cannon Township has no right to seek relief for the Macks or the insurance companies that provided \$55,000 to the Macks. This theory relies upon the contention that Cannon Township cannot proceed as the real party in interest. Second, RPS requests summary disposition under MCR 2.116(C)(7) because of the immunity afforded to municipal corporations by Michigan’s Governmental Tort Liability Act (“GTLA”), MCL 691.1401, *et seq.* The Court must address each of these separate grounds for summary disposition on its own merits.

II. Real Party In Interest

Defendant RPS contests the ability of Plaintiff Cannon Township to pursue the claims of the Macks and the insurance companies that paid \$55,000 to the Macks for their sewage-related losses. Pursuant to MCR 2.116(C)(5), a defendant may seek summary disposition if the “party asserting the claim lacks the legal capacity to sue.” “In general, “[a]n action must be prosecuted in the name of the real party in interest” See In re Beatrice Rottenberg Living Trust, 300 Mich App 339, 356 (2013), citing MCR 2.201(B). “A real party in interest is one who is vested with the right of action on a given claim, although the beneficial interest may be in another.” Id. “The real party in interest rule requir[es] that the claim be prosecuted by the party who by the substantive law in question owns the claim asserted” Id. In this respect, “the real-party-in-interest rule is essentially a prudential limitation on the litigant’s ability to raise the legal rights of another[,]” id. at 355, which serves two purposes. First, the rule “recognizes that litigation should be begun only by a party having an interest that will assure sincere and vigorous advocacy.” City of Kalamazoo v Richland Twp, 221 Mich App 531, 534 (1997). Second, the rule “protects a defendant from multiple lawsuits for the same cause of action.” Id.

Defendant RPS contends that Plaintiff Cannon Township cannot be the real party in interest because Cannon Township neither suffered a sewage-related loss nor paid any money to compensate for the Macks’ sewage-related loss. Although Cannon Township most assuredly has not suffered any loss, our Supreme Court has consistently ruled that an assignee of a cause of action serves as the real party in interest with the authority to litigate that cause of action. See, e.g., Kearns v Michigan Iron & Coke Co, 340 Mich 577, 582-583 (1954). Here, MMLLPP incurred a loss of \$50,000 in the form of a payment to the Macks for sewage-related damages. See Plaintiff’s Brief in Opposition to

Defendant's Motion for Summary Disposition, Exhibit B (Settlement Agreement, § 1). Likewise, Auto-Owners Insurance Company incurred a loss of \$5,000 in the form of a payment to the Macks for sewage-related damages. Finally, the Macks remain uncompensated for property damage beyond the \$55,000 that they have received from MMLLPP and Auto-Owners. See id., Exhibit A (Robert Mack Deposition at 20-21). So far, the Macks and MMLLPP have assigned their claims arising out of the sewage back-up to Cannon Township. See id., Exhibits B (Settlement Agreement, § 2) & C (Assignment Agreement between MMLLPP and Cannon Township). Therefore, Cannon Township is now the real party in interest with respect to the claims of both the Macks and MMLLPP against RPS. See Kearns, 340 Mich at 582-583. And because Cannon Township can lay claim to the status of the real party in interest, the Court must deny the request of RPS for summary disposition under MCR 2.116(C)(5).

In denying summary disposition under MCR 2.116(C)(5), the Court must acknowledge a flaw in the pleadings. Specifically, Plaintiff Cannon Township's complaint contains a caption indicating that it is litigating "on its behalf and [a]dditionally as assignee and subrogee of Robert and Pamela Mack." As the Court's analysis makes clear, however, Cannon Township is actually litigating as the assignee of the Macks and MMLLPP, but not on its own behalf because it has suffered no loss. Our Supreme Court and our Court of Appeals have implicitly acknowledged that midstream adjustments – such as amendment of pleadings – may be undertaken to address real-party-in-interest issues. See, e.g., Miller v Chapman Contracting, 477 Mich 102, 105-106 (2007); Tice Estate v Tice, 288 Mich App 665, 669-671 (2010). Accordingly, the Court shall grant Cannon Township leave to submit an amended complaint within 14 days of the issuance of this opinion to revise the caption to reflect that it is litigating as the assignee of the Macks and MMLLPP, but not on its own behalf.

III. Governmental Immunity

Defendant RPS, as a local governmental entity, seeks protection from civil liability under the GTLA, MCL 691.1401, *et seq.* Summary disposition is appropriate under MCR 2.116(C)(7) when a claim is barred by governmental immunity. *In re Bradley Estate*, 494 Mich 367, 376-377 (2013). Indeed, sovereign immunity in Michigan is as old as our state itself. “Since Michigan became a state in 1837, Michigan jurisprudence has recognized the preexisting common-law concept of sovereign immunity, which immunizes the ‘sovereign’ state from all suits to which the state has not consented, including suits for tortious acts by the state.” *Id.* at 377. “This common-law concept of sovereign immunity has since been replaced in Michigan by the GTLA and is codified by MCL 691.1407(1), which limits a governmental agency’s exposure to tort liability.” *Id.* at 377-378. The statute broadly provides “that ‘a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function.’” *See id.* at 378, quoting MCL 691.1407(1). Plaintiff Cannon Township concedes that RPS was a “governmental agency” engaged in the exercise or discharge of a “governmental function” at all times relevant to this case. *See State Farm Fire & Casualty Co v Corby Energy Services, Inc.*, 271 Mich App 480, 483 (2006) (discussing concepts of “governmental agency” and “governmental function” under GTLA). Cannon Township insists, however, that RPS cannot seek protection under the GTLA for the “sewage disposal system event” that ruined the Macks’ finished basement.

Michigan law expressly deprives a governmental agency such as Defendant RPS of immunity from tort liability for an “overflow or backup” that constitutes “a sewage disposal system event” if “the governmental agency is an appropriate governmental agency.” *See* MCL 600.1417(2). As our Court of Appeals has explained, our Legislature “intended to provide limited relief to persons who

suffer damages as a result of a ‘sewage disposal system event[,]’” see Willett v Waterford Charter Twp, 271 Mich App 38, 46 (2006), but the exception allowing a claimant to “seek compensation for the property damage” pursuant to MCL 691.1417(3) “imposes *several* requirements for a claimant to avoid governmental immunity for a sewage disposal system event.”¹ Willett, 271 Mich App at 49. Specifically, MCL 691.1417(3) comprises five elements that the claimant must establish:

- (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(3). Defendant RPS contends that Plaintiff Cannon Township’s claim founders upon three aspects of these statutory requirements: (1) RPS’s operation of a “sewage disposal system”; (2) the existence of “a defect”; and (3) RPS’s prior knowledge “about the defect.” The Court shall address these three issues in turn.

A. The “Sewage Disposal System” Requirement

To proceed with a claim that escapes the GTLA, Plaintiff Cannon Township must establish that Defendant RPS operated a “sewage disposal system” involved in the event at the Macks’ house. See MCL 1417(3)(b). Under MCL 691.1416(j), “[s]ewage disposal system’ means all interceptor sewers, storm sewers, sanitary sewers, combined sanitary and storm sewers, sewage treatment plants,

¹ The requirements are set forth in two separate subsections of MCL 691.1417. The first five requirements can be found in MCL 691.1417(3); the last two are prescribed by MCL 691.1417(4). Because Defendant RPS has chosen to base its request for summary disposition entirely upon the requirements in MCL 691.1417(3), the Court need not discuss MCL 691.1417(4).

and all other plants, works, instrumentalities, and properties used or useful in connection with the collection, treatment, and disposal of sewage and industrial wastes, and includes a storm water drain system under the jurisdiction and control of a governmental agency.” RPS contends that its water-filtration system does not fall within this definition, so it cannot be held liable for damages resulting from the operation of a “sewage disposal system.”

Analyzing the statutory definition of a “sewage disposal system” in MCL 691.1416(j), our Court of Appeals has ruled that “the term ‘sewage disposal system,’ as used in the sewage disposal system exception, refers to more than instrumentalities dealing with actual sewage.” See Linton v Arenac County Road Commission, 273 Mich App 107, 121 (2006). The record establishes that the water-filtration system at East Rockford Middle School “remove[s] iron and sediment from a water supply.” See Brief in Support of Defendant’s Motion for Summary Disposition, Exhibit 2A (Heavy Duty Operating Instructions). More precisely, the system filters well water and then discharges the resulting waste “during the backwash cycle” into the sewer system. See id., Exhibit 2 (Affidavit of James VanderKolk, ¶ 8); Exhibit 5 (Deposition of Gerry VanCamp at 14); Exhibit 6 (Deposition of Gary Seger at 25, 41). Consequently, the water-filtration system may be characterized as part of both the potable-water system and the sewage-collection system for East Rockford Middle School. See Plaintiff’s Brief in Opposition to Defendant’s Motion for Summary Disposition, Exhibit D (Affidavit of Mark Prein, ¶ 4). Furthermore, the wastewater discharged by the water-filtration system during the backwash cycle flows to the Davies line of the Cannon Township sewage system that serves the Macks’ house, see id. (Affidavit of Mark Prein, ¶ 3), so the water-filtration system at East Rockford Middle School constitutes an “instrumentalit[y] . . . used or useful in connection with the collection, treatment, and disposal of sewage and industrial wastes[.]” See MCL 691.1416(j). And because the

water-filtration system at East Rockford Middle School fits comfortably within the definition of a “sewage disposal system” in MCL 691.1416(j), RPS cannot avail itself of immunity under the GTLA by repairing to the language of MCL 691.1417(3)(b) that disqualifies a claimant from any monetary recovery unless the governmental agency subject to suit operated a “sewage disposal system.”

B. The Existence of a “Defect”

Defendant RPS next asserts that, even if it operated a “sewage disposal system,” that system had no “defect,” so the GTLA immunizes RPS against tort liability. The governing statute defines “‘defect’ as ‘a construction, design, maintenance, operate, or repair defect.’” Willett, 271 Mich App at 51, quoting MCL 691.1416(e). Significantly, our “Legislature has not included a ‘fault’ element in MCL 691.1417(3)(b).” Willett, 271 Mich App at 52. As a result, Plaintiff Cannon Township is obligated only to allege and prove “the mere existence of a ‘defect’ in the sewage disposal system” at East Rockford Middle School. See id. Cannon Township has easily met that standard. As both sides readily recognize, the backwash cycle on the water-filtration system is operated by a valve that “does not automatically close when power is lost and restored.” See Brief in Support of Defendant’s Motion for Summary Disposition, Exhibit 2 (Affidavit of James VanderKolk, ¶¶ 17-18). Therefore, during a power outage, the backwash-cycle valve remains open and, as a result, the water-filtration system continuously discharges wastewater into the sewer line. That characteristic of the backwash-cycle valve, which led to the sewage back-up at the Macks’ house on August 20, 2011, manifestly constitutes a “defect” as defined by MCL 691.1416(e). See Willett, 271 Mich App at 50-52. Thus, Cannon Township has fulfilled its statutory obligation to allege and demonstrate that the “[s]ewage disposal system had a defect.” See MCL 691.1417(3)(b).

C. Prior Knowledge “About the Defect”

Finally, Defendant RPS argues that it had no knowledge of the valve defect before the back-up occurred at the Macks’ house on August 20, 2011, so Plaintiff Cannon Township cannot satisfy the requirement that RPS “knew, or in the exercise of reasonable diligence should have known, about the defect.” See MCL 691.1417(3)(c). The record belies RPS’s argument because, in September of 2010, RPS plainly learned of the backwash-valve defect during a power outage that resulted in a back-up of sewage in another house on the Macks’ sewer line.² Specifically, Gerry VanCamp – the head custodian at East Rockford Middle School – was informed by a sewage worker that a large volume of water was flowing from the middle school. See Brief in Support of Defendant’s Motion for Summary Disposition, Exhibit 5 (Deposition of Gerry VanCamp at 12-13). VanCamp went to the boiler room in the middle school and “[t]urned the valves off” to stop the flow of wastewater into the sewer system. See id. (Deposition of Gerry VanCamp at 13-14). VanCamp then reported the problem to “Gene VanPutten or his secretary” in the RPS maintenance department. Id. (Deposition of Gerry VanCamp at 20). Based upon this evidence, RPS most certainly “knew, or in the exercise of reasonable diligence should have known, about the defect” with the valve prior to the back-up at the Macks’ house in August of 2011. Consequently, the Court must deny the request for summary disposition presented by RPS under MCR 2.116(C)(7) because Cannon Township has presented a wealth of evidence to support its claim for damages arising from a “sewage disposal system event.” See MCL 691.1417(2).

² The record establishes that the sewage back-up occurred at 7343 Davies on September 22, 2010. See Plaintiff’s Brief in Opposition to Defendant’s Motion for Summary Disposition, Exhibit E (Deposition of Gary Seger, Attachment 1 – Kent County Department of Public Works report). Indeed, a letter written by Christine James on August 23, 2011, describes the event in August 2011 as “the second backup at this property due to the backwash problem.” Id., Exhibit F.

IV. Conclusion

For all of the reasons set forth in this opinion, Plaintiff Cannon Township may proceed as the assignee of claims from the Macks and MMLLPP, but Cannon Township must first submit an amended complaint within 14 days accurately identifying its role in this litigation. Because such an amendment will obviate all concerns about Cannon Township's status as a real party in interest, the request by Defendant RPS for summary disposition under MCR 2.116(C)(5) must be denied. Also, in light of the satisfactory showing by Cannon Township of a basis to proceed with its claim under MCL 691.1417(2) for damages resulting from a sewage disposal system event, the Court must deny RPS's demand for summary disposition under MCR 2.116(C)(7) and the GTLA.

IT IS SO ORDERED.

Dated: February 27, 2014



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge