

engineering judgment and consider the following non-exclusive factors: amount of precipitation, property SBU history, condition of the sewer system in the neighborhood, results of a visual inspection of the neighborhood to look for signs of overland flooding, neighborhood SBU history, capacity of nearby public sewer lines, and topography. (Doc. 131, Consent Decree, Ex. 8 at 2). Damages arising from basement backups for which MSD is responsible are limited to documented real and personal property. *Id.* Homeowners who are dissatisfied with MSD's disposition of a claim under the SBU program may request review of the decision by the Magistrate Judge, whose decision is binding and not subject to any further judicial review. (Docs. 154, 190).

Mr. and Mrs. Miles are the owners of the property located at 6622 South Oak Knoll Drive, Cincinnati, Ohio. They seek compensation for personal property loss sustained in early May 2012, due to alleged sewer backup into their basement. On May 27, 2014, Mr. and Mrs. Miles filed an SBU claim with MSD. MSD denied the claim because it was filed more than two years from the date of the incident and because Mr. and Mrs. Miles failed to notify MSD of the potential backup within 24 hours of the discovery of its occurrence. MSD concluded that it was therefore not responsible for the damages claimed. Mr. and Mrs. Miles disagreed and filed this appeal.

At the hearing on this matter, Mr. Miles testified that he reported the flooding of his basement to MSD sometime within the first week of the occurrence, although he did not recall the precise date. He testified he did not receive a response from MSD and called back several weeks later. Following this contact with MSD, a crew was dispatched to the Miles' residence on May 30, 2012 to perform clean up services and document the damages. Mr. Miles had

performed much of the cleaning himself prior to MSD's visit. Mr. Miles testified that he believed there was widespread flooding throughout his neighborhood and that many homes were affected by sewer backups. He testified that he observed MSD trucks on his street throughout the week of the flooding. In support of their claim, Mr. and Mrs. Miles present photographs showing the items damaged during the flooding of their basement, Offsite Disposal Reports listing the items damaged, and receipts for the replacement of major appliances.

MSD presents evidence that on May 30, 2012, MSD received a call from Mr. Miles stating that there had been water in his basement about three weeks prior and he would like to make a claim. MSD responded to the Miles' property that same day with a crew to investigate his complaint. At the time, there was no main sewer trouble noted. Mr. Miles explained to the crew that he "was part of that storm damage" that had occurred three weeks earlier. (Doc. 728, Ex. A, MSD complaint form). On June 4, 2012, MSD dispatched a cleaning crew to Mr. and Mrs. Miles' residence and documented the items that were disposed of by MSD. (Doc. 728, Ex. C). On May 27, 2014, Mr. and Mrs. Miles filed an SBU claim with MSD requesting reimbursement for property damage as a result of the May 2012 incident. MSD denied the claim because more than two years had passed since the likely date of the backup and because Mr. and Mrs. Miles had failed to report the backup to MSD within 24 hours as required by Exhibit 8 to the Consent Decree. (Doc. 726, Ex. 1).

MSD's evidence shows that Mr. and Mrs. Miles reported the backup incident to MSD on May 30, 2012. (Doc. 728, Ex. A). MSD states that because the report was made three weeks after the incident, MSD was unable to determine the cause of the damage to the Miles' property. Other investigations performed by MSD on South Oak Knoll Drive on May 1 and May 8, 2012,

showed signs of both surcharge of the main sewer line and overland flooding. Because MSD had no opportunity to investigate the source of water in the Miles' basement, MSD contends it was unable to determine whether the damages sustained by Mr. and Mrs. Miles were the result of a sewer backup, which is compensable under the Consent Decree, or overland flooding, which is not. In fact, MSD points to a Property Offsite Disposal Report prepared by Mr. Miles which suggests the damage to his garage door was caused by overland flooding. The report states that the garage door was damaged when a rush of water down the driveway caused a garbage can to slam into a lower panel of the garage.

Subsequent to the hearing, Mr. Miles presented additional evidence in support of his claim. He presented the names and addresses of three homeowners on South Oak Knoll Drive who experienced basement flooding in early May 2012. Mr. Miles also presented customer service literature from MSD about reporting a sewer backup and a statement from his insurance company showing that he made no claim in connection with the May 2012 basement flooding. Mr. Miles points out that the MSD flyer does not inform homeowners they must report a backup "within 24 hours."

In response to this evidence, MSD presents the affidavit of MSD Engineering Technical Supervisor Tom Fronk. Mr. Fronk investigated the SBU history of the three residences identified by Mr. Miles in his supplement and determined the following: (1) 6621 South Oak Knoll: the May 1, 2012 reported SBU was caused by storm water emanating from the rear yard and was unrelated to the public sewer; (2) 6576 South Oak Knoll and 6598 South Oak Knoll: although both properties reported SBUs on May 1, 2012, unlike the property at 6622 South Oak Knoll, both of these properties tap into sewer lines that have additional sewer lines and storm

water inlets which cause a greater potential for sewer surcharge given the amount of water flow and location of the properties. (Doc. 736, Ex. 1). Mr. Fronk opines that any possible sewer backups in these latter two locations, which are 475 feet and 265 feet upstream from 6622 South Oak Knoll (the Miles' property) respectively, are not indicative of the conditions at the Miles' property. Mr. Fronk also testified at the hearing of this matter and stated that because MSD did not receive a report of a basement backup from Mr. and Mrs. Miles until three weeks after the alleged incident, MSD did not have sufficient information to determine the source of the water in their basement.

As an initial matter, the Court notes that under the Consent Decree that governs the Court's review of SBU appeals, the provision of cleanup services under this program does not constitute an admission of liability by MSD with regard to any claims that the occupant may have against MSD for real or personal property damage caused by the building backup. (Doc. 131, Ex. 7 at 4). MSD will provide cleanup services when doubt exists about the cause of the backup after an initial investigation based on the health risks posed by floods and water damage. (Doc. 640, Ex. B). Therefore, the fact that MSD provided this cleaning service to the property at 6622 South Oak Knoll Drive is not evidence that the water in the Miles' basement was the result of a backup of the public sewer.

MSD is correct that the Consent Decree requires that occupants who incur property damage as a result of a basement backup which they believe is MSD's responsibility "must notify MSD within 24 hours of the time that the occupant discovers" the SBU. (Doc. 131, Consent Decree, Ex. 8). Mr. Miles has submitted evidence that the mailer and magnet information provided to homeowners by MSD do not inform customers of the 24-hour

deadline. However, the mailer does advise homeowners to report a sewer backup to MSD “as soon as possible.” Mr. Miles candidly admitted he did not recall the specific date he first contacted MSD, but he did recall he contacted MSD within the first week. The Court credits his testimony and finds that his failure to report the water in the basement within 24 hours should not bar the claim given the MSD information upon which he relied.²

However, it is undisputed that Mr. and Mrs. Miles’ claim was not filed with MSD within the two-year statute of limitations governing damages claims. Under Ohio Revised Code § 2744.04, actions against political subdivisions in Ohio must be brought within two years “after the cause of action accrues.” A cause of action against a governmental entity accrues “when all the events which fix the government’s alleged liability have occurred and the plaintiff was or should have been aware of their existence.” *Hamilton v. Ebbing*, No. CA 2011-01-001, 2012 WL 1825268, at *6 (Ohio Ct. App. May 21, 2012). Mr. Miles asserts the basement flooding occurred sometime in the first week of May 2012. Mr. and Mrs. Miles filed their SBU claim with MSD on May 27, 2014, after the statute of limitations had already expired. Therefore, their claim is barred by the two-year statute of limitations set forth in Ohio Rev. Code § 2744.04.³

The statute of limitations is subject to equitable tolling where certain conditions are met. Equitable tolling is appropriate where: (1) the defendant made a factual misrepresentation; (2) that was misleading; (3) such misrepresentation induced actual reliance which is reasonable and in good faith; and (4) such reliance caused detriment to the relying party. *Moore v. Schiano*, 690

² The Court strongly urges MSD to revise its customer service information to advise customers of the provision that customers must notify MSD within 24 hours of the time the customer discovers the SBU.

³ The Court notes that unlike the 24-hour deadline for reporting a backup to MSD, MSD’s website and claim form clearly advise customers of the two-year deadline for filing a claim for property damage. MSD’s Sewer Backup Response Program website advises customers, “Please be advised that your claim must be received by MSD no later than two years after the date of your SBU.” See <http://sbu.msdbg.org/sbu/page/filing-a-claim.aspx>. Likewise, the cover page of the MSD Claim Form cautions customers: “Please note: Your claim must be received by MSD no later than two years after the date of your sewer backup.” *Id.* (emphasis in the original).

N.E.2d 597, 600 (Ohio Ct. App. 1997) (citing *Doe v. Blue Cross/Blue Shield of Ohio*, 607 N.E.2d 492 (Ohio Ct. App. 1992)). At the hearing of this appeal, the Court asked Mr. Miles why he waited until May 27, 2014 to file a claim. Mr. Miles testified that he was advised to take his time in documenting his claim. He also testified that he wanted to discern the state of his health over the long-term because he performed the majority of the cleanup work himself and he was aware that his exposure to contaminated water might pose a hazard to his health.

The Court finds that equitable tolling of the statute of limitations is not appropriate in this case. There is no evidence that MSD or its representatives made any misrepresentations to Mr. and Mrs. Miles in connection with the filing of their claim. In addition, it does not appear that Mr. and Mrs. Miles' claim is particularly complicated such that it would take more than two years to file the claim. In addition, while Mr. Miles' concern about the health ramifications of the cleanup he performed is understandable, the Consent Decree does not provide compensation for personal injury, such as damage to a person's health, as a result of a sewer backup. Therefore, even if Mr. Miles' health were adversely affected, the Court cannot compensate him for any damages in this regard. There is simply no basis for equitable tolling of the statute of limitations in this case. Accordingly, Mr. and Mrs. Miles' claim is denied as barred by the statute of limitations.


Even if this claim was not barred by the two-year statute of limitations, Mr. and Mrs. Miles have not met their burden of proof to show that the damages they sustained were caused by a backup of MSD's sewer system. Claimants like Mr. and Mrs. Miles who seek review of the denial of an SBU claim bear the burden of proof of showing that the backup of water into their property was due to inadequate capacity in MSD's sewer system (a sewer discharge) and not

overland flooding. (Doc. 131, Consent Decree, Ex. 8 at 1). Here, Mr. and Mrs. Miles have not established that the water backup into their basement was caused by inadequate capacity in MSD's sewer system. There is evidence that both overland flooding and sewer capacity issues existed in early May 2012 on South Oak Knoll Drive. MSD presents evidence that a storm water issue, and not SBU, was the cause of the water in the South Oak Knoll residence directly across the street from the Miles' residence. There is also evidence of overland flooding and sewer surcharges affecting some homes on South Oak Knoll Drive in early May 2012. Because MSD's investigation of the backup at the Miles' residence did not occur contemporaneously with the event, but instead took place some three weeks after the event, MSD was unable to assess the exact cause of the backup. Even assuming Mr. Miles called within the first week of the incident and MSD failed to call him back, the fact that he waited until the end of May to re-contact MSD effectively prevented MSD from determining the cause of the flooding. The Consent Decree explicitly precludes an award of damages for water in buildings caused by overland flooding not emanating from MSD's Sewer Systems. (Doc. 131, Consent Decree, Ex. 8 at 1). In the absence of evidence establishing the property damage was more likely caused by a discharge in the sewer line and not overland flooding or some other cause, the Court is constrained to uphold MSD's decision in this case.

Therefore, the Court denies Mr. and Mrs. Miles' appeal in this case.

IT IS SO ORDERED.

Date: 11/6/14


Karen L. Litkovitz, Magistrate Judge
United States District Court