STATE OF MICHIGAN

COURT OF APPEALS

DEPARTMENT OF ENVIRONMENTAL QUALITY and DIRECTOR OF THE DEPARTMENT OF ENVIRONMENTAL QUALITY, Plaintiffs-Appellees,	FOR PUBLICATION August 17, 2010 9:00 a.m.
v	No. 289724 Ingham Circuit Court
TOWNSHIP OF WORTH, Defendant-Appellee.	LC No. 07-000970-CE

Before: OWENS, P.J., and SAWYER and O'CONNELL, JJ.

SAWYER, J.

In this case, we are asked to determine whether Michigan's Natural Resources and Environmental Protection Act (NREPA)[1] empowers the Department of Environmental Quality to require a township to install a sanitary sewer system where there is a widespread failure of private septic systems resulting in contamination of lake waters. We hold that it does not.

Defendant is a common law township in Sanilac County along the shores of Lake Huron. It does not operate a public sanitary sewer system. All of the residences and businesses within the township rely on private septic systems for waste disposal. A problem has developed with a number of those private septic systems located on a strip of land approximately five miles long located between highway M-25 and Lake Huron. Some of these septic systems are failing, resulting in effluent being discharged into Lake Huron and its tributaries. For the past several years, plaintiff DEQ, as well as the county health department, has been pushing for defendant to install a public sanitary sewer system. Defendant has declined to do so, concluding that such a project was not financially feasible.

Defendant's refusal to pursue a sanitary sewer project has resulted in the instant litigation to force it to do so. The parties pursued cross-motions for summary disposition, resulting in an order of the circuit court granting summary disposition to plaintiffs, establishing a time frame for

[1] MCL 324.101 *et seq.*

defendant to design, begin construction on and begin operating a sewer project intended to remedy the failing septic systems and resulting discharges.[2] The order also imposed a $60,000 fine and awarded attorney fees. Defendant appeals from this order and we reverse.

The resolution of this case rests upon the proper interpretation and application of MCL 324.3109(2) and MCL 324.3115. Like a motion for summary disposition, we review a question of statutory interpretation de novo. *Bush v Shabahang*, 484 Mich 156, 164; ___ NW2d ___ (2009). Plaintiffs look to the first statute to establish defendant's responsibility for the discharge from the private septic systems into the waters of Lake Huron and then look to MCL 324.3115 for the remedy of requiring defendant to install and operate a public sanitary sewer system. We are not persuaded that MCL 324.3109(2) imposed the responsibility on defendant that plaintiffs suggest that it does.

MCL 324.3109 provides in pertinent part as follows:

> (2) The discharge of any raw sewage of human origin, directly or indirectly, into any of the waters of the state shall be considered prima facie evidence of a violation of this part by the municipality in which the discharge originated unless the discharge is permitted by an order or rule of the department. If the discharge is not the subject of a valid permit issued by the department, a municipality responsible for the discharge may be subject to the remedies provided in section 3115. If the discharge is the subject of a valid permit issued by the department pursuant to section 3112, and is in violation of that permit, a municipality responsible for the discharge is subject to the penalties prescribed in section 3115.
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> (3) Notwithstanding subsection (2), a municipality is not responsible or subject to the remedies provided in section 3115 for an unauthorized discharge from a sewerage system as defined in section 4101 that is permitted under this part and owned by a party other than the municipality, unless the municipality has accepted responsibility in writing for the sewerage system and, with respect to the civil fine and penalty under section 3115, the municipality has been notified in writing by the department of its responsibility for the sewerage system.

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[2] Technically speaking, the trial court's order does not specifically compel the construction of a sanitary sewer project. Rather, it refers to defendant's obligation "to take necessary corrective action" and then establishes a time frame for that action. The time frame refers to a deadline for defendant to submit for the DEQ's approval a "proposed service area" as well as deadlines for the design, approval by the DEQ, construction, and beginning of operations of "the project." But, in light of plaintiffs' explicit statement that it views as the only practical option the construction of a municipal sewer system, it seems rather apparent that "the project" is a sanitary sewer system constructed and operated by defendant. In any event, as discussed later in this opinion, we conclude that there is no statutory authority to grant plaintiffs the power to determine the appropriate remedy.

Defendant argues that MCL 324.3109 does not impose responsibility upon a municipality for any discharge that occurs within its jurisdiction, but merely creates a rebuttable presumption that the municipality was the source of the discharge. We agree.

First, we must look to the meaning of "prima facie evidence." Because this is a legal term not defined by the statute, we may consult a legal dictionary.[3] Black's Law Dictionary (5th ed), p 1071, defines "prima facie evidence" as follows:

> Evidence good and sufficient on its face; such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if not rebutted or contradicted, will remain sufficient. Prima facie evidence is evidence which, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but which may be contradicted by other evidence.
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> Prima facie evidence is evidence that, until its effect is overcome by other evidence, will suffice as proof of fact in issue; "prima facie case" is one that will entitle party to recover if no evidence to contrary is offered by opposite party. Evidence which suffices for the proof of a particular fact until contradicted and overcome by other evidence. Evidence which, standing alone and unexplained, would maintain the proposition and warrant the conclusion to support which it is introduced. An inference or presumption of law, affirmative or negative of a fact, in the absence of proof, or until proof can be obtained or produced to overcome the inference. [Citations omitted.]

This definition makes it abundantly clear that prima facie evidence is rebuttable. Thus, MCL 324.3109(2) clearly does not make a municipality automatically and conclusively responsible for a discharge of raw sewage. Rather, it merely creates the presumption that the municipality is responsible until and unless the municipality is able to establish that it did not violate Part 31 of NREPA, which deals with the protection of water resources. Defendant advances a particularly compelling argument that it is not the source of the violation: it does not operate any sanitary sewer system that could be the source of the discharge.

Second, we look to the meaning of the phrase "by the municipality." This phrase is key because it answers plaintiffs' contention that MCL 324.3109(2) imposes responsibility for a discharge upon a municipality without regard to the source of the discharge. That is, plaintiffs argue that any discharge of raw sewage within a municipality constitutes prima facie evidence of a violation by the municipality even if the municipality is not the source of the discharge. We disagree. The word "by" has many meanings. As a nonlegal term, we look to a layman's dictionary rather than a legal one. *Horace v City of Pontiac*, 456 Mich 744, 756; 575 NW2d 762 (1998). We find these from the Random House Webster's College Dictionary (2d ed) to be particularly helpful: "10. through the agency of" and "12. as a result or on the basis of." Thus,

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[3] *Nuculovic v Hill*, 287 Mich App ___; ___ NW2d ____ (No. 280216, issued 1/5/2010), slip op at 5.

MCL 324.3109(2) imposes responsibility on the municipality not merely because the violation occurs within the boundaries of the municipality, but when the violation occurs "through the agency of" the municipality or "as a result" of the municipality. That is to say, where it is the actions of the municipality that leads to the discharge.

The argument that the municipality must actually cause the discharge is further buttressed by a third factor. MCL 324.3109(3) explicitly states that a municipality is not responsible for a discharge from a sewerage system that is not operated by the municipality unless the municipality has accepted responsibility in writing for the sewerage system. If the purpose of subsection (2) was to impose liability upon a municipality merely because a discharge occurred within its boundaries, then subsection (3) becomes contradictory.

Indeed, an argument advanced by plaintiffs in an issue that we need not reach, whether the state is obligated to fund the sewer system under the Headlee Amendment[4] if defendant is compelled to construct one, further reinforces this argument. Plaintiffs argue that the obligation of a township to install a sanitary sewer system predates the Headlee Amendment and, therefore, does not constitute a new local obligation that the Headlee Amendment compels the state to fund. In making this argument, plaintiffs look to the former statute, MCL 323.6, which states in pertinent part that any "city, village or township which permits, allows or suffers the discharge of such raw sewage of human origin into any of the waters of the state by any of its inhabitants or persons occupying lands from which said raw sewage originates, shall be subject only to the remedies provided for in section 7 of this act."

Assuming for the sake of argument that such a remedy included a compulsory installation of a sanitary sewer system,[5] while perhaps saving the state from being obligated to fund a sewer system in Worth Township if the current statute would continue to impose such an obligation, it only serves to underscore that no such obligation exists. While Part 31 of NREPA parallels the former act in many respects, there are some very noticeable differences. First, while the old section 6 specifically refers to a "city, village or township," the modern section 3109 refers more generally to "municipality," a word that, as will be discussed below, carries a much broader definition. But even more importantly, while the old section 6 specifically addresses the issue of a city, village or township that allows a discharge to occur by any of its inhabitants, there is no such language in the current statute which links responsibility for actions of an inhabitant to a particular governmental body. It is a basic rule of statutory construction that a change in the use of words by the Legislature is intentional and reflects a similar change in meaning.[6] So if, as

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[4] See Const 1963, art IX, §§ 25 and 29.

[5] Given the lack of any clear mandate in the former MCL 323.7 of such a remedy, this would seem to be a great assumption indeed, particularly in light of the failure of past panels of this Court to find any such obligation. See, e.g., *McSwain v Redford Twp*, 173 Mich App 492, 499-500; 434 NW2d 171 (1988) ("we do not believe defendant was required by statute to install a sanitary sewer system under the instant circumstances"); *Ahearn v Bloomfield Charter Twp*, 235 Mich App 486, 494-495; 597 NW2d 858 (1999) (just because a township has provided sanitary sewer service does not mean that it is under a continuing duty to do so).

[6] *Bush*, 484 Mich at 167.

plaintiffs argue, the old statute did impose an obligation on a township to install a sanitary sewer system in response to an inhabitant discharging sewage, then it follows that the change in wording of the statute reflects an intent by the Legislature to remove such an obligation.[7]

For these reasons, we agree with defendant's interpretation of subsection (2). Where an unauthorized discharge occurs, the presumption arises that the municipality within whose boundaries the event occurs is responsible for the violation unless the municipality can establish that the discharge did not occur as the result of actions by the municipality. Where, as here, the municipality could not be the source of the discharge because it does not operate a sanitary sewer system, it has overcome that presumption and is not subject to the statutory remedies for a discharge.

In any event, even if we were to agree with plaintiffs that MCL 324.3109(2) creates a responsibility by a municipality for an authorized discharge of raw sewage and the municipality is thus subject to the remedies of section 3115, plaintiffs face another hurdle: the definition of "municipality." For purposes of Part 31 of NREPA, MCL 324.3101(m) supplies a particular definition of "municipality: "this state, a county, city, village, or township, or an agency or instrumentality of any of these entities." Thus, the state is as much a municipality as is defendant. And, by extension, the state bears as much responsibility for the unauthorized discharges at issue in this case as does defendant. And the state is as liable to the remedies of section 3115 as is defendant. Thus, even if we were to agree with plaintiffs that MCL 324.3109(2) imposes upon a "municipality" the responsibility of installing a sanitary sewer system to abate a problem with the discharge of raw sewage, plaintiffs offer no compelling reason why it should be permitted to shift its own responsibility to install a sanitary sewer onto defendant. Or, to put it another way, if plaintiffs are entitled to prevail in this action, then we see no reason why defendant could not counterclaim against plaintiffs and prevail in a claim seeking to require plaintiffs to install the sewer system.

Indeed, if the purpose of section 3109(2) is to impose responsibility on a governmental unit, it would seem that the legislative intent would be to make the DEQ the primary responsible agency because the Legislature had available to it the use of a term that did not include the state, namely "local unit." MCL 324.3101(l), defines "local unit" to mean "a county, city, village, or township or an agency or instrumentality of any of these entities." The only difference between the definition of "local unit" and "municipality" in section 3101 is the inclusion of "this state" in the definition of "municipality" and not in the definition of "local unit." The Legislature's

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[7] Indeed, plaintiffs' argument in this respect places them in a logical corner. If the prior statute did impose a duty on a township to install a sanitary sewer in these circumstances, then the change in statutory language of necessity did away with that duty. But if no such duty existed under the previous statute and the current statute does, then the Headlee Amendment obligates the state, of which the DEQ is an agency, to provide the funding in order for plaintiffs to compel defendant to install such a system.

choice of "municipality" rather than "local unit" in section 3109(2) must have been intentional[8] and it must have been for the purpose of imposing liability on the state as well as a local unit.

But the more logical explanation is that section 3109(2) simply is not designed to establish responsibility for a discharge without causation. If the Legislature intended to, as plaintiffs suggest, impose responsibility upon a governmental unit where an inhabitant causes a discharge, why would it use a term that would simultaneously impose such responsibility upon three or four units of government[9] and without any clear mandate as to which of those units were responsible? But if we interpret the statute as suggested by defendant, then the statute creates the presumption that each of those units of government are the cause of the discharge and each avoids responsibility when it establishes that it was not the source of the discharge.

In sum, we hold that MCL 324.3109(2) does not impose blanket responsibility upon a municipality for any sewage discharge that occurs within its jurisdiction without regard to cause and a corresponding obligation to remedy such discharges. Rather, it merely creates the presumption that such a discharge originated with the municipality. But where, as here, the municipality, defendant in this case, cannot be the cause of the discharge, it holds no responsibility for the discharge. And, therefore, there is no basis to impose upon defendant the obligation to pursue a remedy desired by plaintiffs, the installation of a public sanitary sewer system. The trial court should have granted summary disposition to defendant, not to plaintiffs.

In light of our resolution of this issue, we need not address the remaining issues raised by defendant.

The order of the circuit court granting summary disposition to plaintiffs is reversed. The matter is remanded to the circuit court with instructions to enter an order of summary disposition in favor of defendant. We do not retain jurisdiction. Defendant may tax costs.

/s/ David H. Sawyer
/s/ Donald S. Owens

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[8] See *Bush*, 484 Mich at 167.

[9] Under the term "municipality, the state and the county would always be responsible, as well as the city or township. And, if not a city, then it would be possible for a village within a township to also be responsible.