

STATE OF MICHIGAN
COURT OF APPEALS

DANIEL KANOUSE and DEBORAH
KANOUSE,

Plaintiffs-Appellants,

v

MONTCALM COUNTY DRAIN
COMMISSIONER and DONALD E. COOPER,

Defendants-Appellees.

UNPUBLISHED
March 19, 2002

No. 236285
Montcalm Circuit Court
LC No. 01-000430-AS

Before: Meter, P.J., and Markey and Owens, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order dismissing as untimely their complaint for superintending control. Plaintiffs were attempting to challenge a board of review's decision regarding their apportionment of benefits for the improvement and maintenance of the Weatherby Drain. We reverse.

A petition was filed with defendant Donald E. Cooper, the Montcalm County Drain Commissioner (MCDC), pursuant to the drain code, MCL 280.1 *et seq.*, for the improvement and maintenance of the Weatherby Drain. A board of determination found that the work requested in the petition was necessary for the public health, convenience, and welfare and issued an order of necessity. The MCDC made an apportionment of benefits, and plaintiffs protested their apportionment. On May 9, 2001, the Montcalm County Probate Court appointed a board of review to hear plaintiffs' protest. The court scheduled the board of review meeting for May 14 in the MCDC office. According to plaintiffs, they received a phone call notifying them of the May 14 hearing on May 11 and received by mail on May 12 a written copy of the court's order appointing the board of review.

At the hearing, plaintiffs complained about insufficient notice, but the board proceeded to decision, apparently deciding that it had no authority to recess to give plaintiffs time to gather further evidence. The board's decision was filed in the Montcalm County Probate Court on May 14. However, plaintiffs did not see that decision until after the court mailed them a copy on May 29, in response to their inquiry. On June 5, plaintiffs filed a complaint for superintending control in the Montcalm Circuit Court under MCL 280.161. The circuit court dismissed the complaint as untimely because under MCL 280.161, a writ for superintending control must issue within ten days of the filing of a board of review's decision.

Plaintiffs now appeal, primarily alleging that the 10-day filing period under MCL 280.161 must be measured from the date an appellant receives *notice* of a board of review's decision. They further allege a violation of MCL 280.156, which requires that an appellant receive notice of a board of review hearing by personal service no less than five days before the date of the hearing. As noted above, plaintiffs claim that they were first notified of the May 14 hearing by telephone on May 11.

Our review of a circuit court's decision to grant or deny a complaint for superintending control in connection with matters governed by the drain code is limited to determining whether the court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test with respect to the agency's factual findings. *Barak v Drain Comm'r for Co of Oakland*, 246 Mich App 591, 597; 633 NW2d 489 (2001). In other words, we review the circuit court's decision for clear error. *Id.* at 597. A decision is clearly erroneous if, after reviewing the entire record, this Court is left with the definite and firm conviction that a mistake occurred. *Id.*

In their appellate brief, plaintiffs address at length the argument that they were deprived of due process by the lack of prompt notice from the drain commissioner regarding the board of review's decision and by a strict construction of the ten-day filing limit found in MCL 280.161. However, we conclude that plaintiff's argument regarding the lack of statutory notice under MCL 280.156 is dispositive of this appeal and renders an analysis of their additional argument unnecessary.

Plaintiffs were entitled to receive five days notice of the board of review hearing by personal service.

The [drain] commissioner shall [after a probate court has appointed a board of review and set the time and place it shall meet] give notice . . . upon the appellant if he be a resident of any township affected. Such notice shall be made not less than 5 days before the day of hearing and shall be made by personal service. Proof of service of notice of appeal shall be made by the person serving said notice and be filed in the office of the judge of probate. [MCL 280.156.]

Plaintiffs alleged in their complaint that they never received this statutory notice but rather were notified of the hearing by a telephone call three days beforehand and by a mailed notice received two days beforehand. In the MCDC's answer to the complaint, the MCDC averred insufficient knowledge or information to form a belief regarding the truth or falsity of plaintiffs' allegation. The record contains no assertion or documentation by the MCDC, who should have proof of compliance if it indeed exists, that the required statutory notice occurred, and on appeal, the MCDC does not allege that the required statutory notice occurred. Accordingly, there is no disputed issue of fact regarding the truth of plaintiffs' allegation. See generally *Boron Oil Co v Southfield*, 18 Mich App 135, 138; 170 NW2d 517 (1969). In child protective proceedings, failure to comply with the provisions for statutory notice is a jurisdictional defect that renders the subsequent proceedings void with respect to the party to whom notice was denied. See *In re Atkins*, 237 Mich App 249, 251; 602 NW2d 594 (1999). We apply this doctrine by analogy. See *International Salt Co v Wayne Co Drain Commissioner*, 367 Mich 160, 173; 116 NW2d 328 (1962) (emphasizing the importance of proper notice in drain code proceedings). Accordingly, the failure of the notice to comply with the requirements of the statute renders the proceedings

and decision of the board of review void. Because the decision is void, the ten-day time period for the issuance of a writ for superintending control in connection with review of a valid board decision never started to run. Therefore, clear error occurred with respect to the circuit court's decision. We reverse the court's order of dismissal and remand with an instruction that the board of review's decision be vacated and a new hearing noticed.

Reversed and remanded. We do not retain jurisdiction.

/s/ Patrick M. Meter

/s/ Jane E. Markey

/s/ Donald S. Owens