

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
 COUNTY DEPARTMENT, CHANCERY DIVISION

DENNIS TZAKIS et al., Plaintiffs)	2009 CH 6159
v.)	INCLUDING CONSOLIDATED
BERGER EXCAVATING CONTRACTORS,)	CASES: 2010 CH 38809
INC., ADVOCATE HEALTH et al, Defendants)	2011CH29586
		2013 CH 10434
		2014 CH06755
		HON. SOPHIA H. HALL

APRIL 3, 2015 ORDER RE PDR DECISION AS TO LPES AND OTHER ISSUES

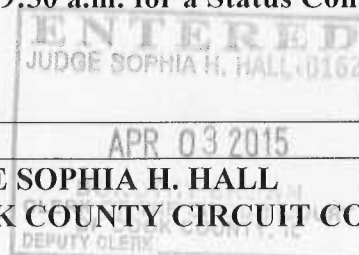
Upon the parties hereto stipulating to this Order; and upon Court being duly informed of the premises for this Order;

IT IS HEREBY FOUND AND/OR ORDERED:

- 1. DISMISSAL BASED UPON PUBLIC DUTY RULE:** For the reasons set forth in the Court’s Written Decision dated April 3, 2015, the District, Park Ridge and Maine Township’s motion to dismiss relating to the Public Duty Rule is granted. Said Court’s Written Decision of 8 pages is attached hereto as EXHIBIT A. This Decision applies to all the Consolidated Cases set forth in the above caption. This Decision also applies (a) to the County of Cook as to all cases and (b) the Village of Niles relating to Cs# 14 CH 6755.
- 2. ADJACENT PROPERTY POSSESSOR DUTY:** There is an issue as to the procedural basis for the “Plaintiffs’ Motion for a Ruling on the Adjacent Property Possessor Duty”. Plaintiffs shall file a Supplemental Brief addressing the procedural propriety of the Plaintiffs’ Motion for a Ruling including the applicable civil procedure rule and/or statute governing this filing by Friday, May 8, 2015. This Motion is entered and continued until Friday, May 15, 2015 at 9:30 a.m. for a Status Conference.
- 3. 12 PERSON JURY DEMAND:** Defendant Advocate’s “Motion for Leave to File a Twelve (12) Person Jury Demand Instanter” is entered and continued. Plaintiffs’ shall file a Response by Friday, May 8, 2015.
- 4. ALL OTHER MATTERS ENTERED AND CONTINUED:** All other matters are entered and continued until Friday, May 15, 2015 at 9:30 a.m. for a Status Conference.

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ENTERED:
 Dated: _____
HONORABLE SOPHIA H. HALL
JUDGE, COOK COUNTY CIRCUIT COURT



**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

**DENNIS TZAKIS, ZENON GIL,
CATHY PONCE, ZAIA GILIANA, JULIA
CABRALES, and JUAN SOLIS, ON BEHALF
OF THEMSELVES AND ALL OTHER
PERSONS SIMILARLY SITUATED, A
Proposed Class Action,**

Plaintiffs,

v.

**BERGER EXCAVATING CONTRACTORS,
INC., ADOVCATE HEALTH AND
HOSPITALS CORPORATION D/B/A/
ADVOCATE LUTHERAN GENERAL
HOSPITAL, COOK COUNTY, GEWALT
HAMILTON ASSOCIATES, INC., VILLAGE
OF GLENVIEW, MAINE TOWNSHIP,
METROPOLITAN WATER RECLAMATION
DISTRICT OF GREATER CHICAGO,
and CITY OF PARK RIDGE,**

Defendants.

**Case No. 09 CH 6159
(Consolidated with 10 CH 38809,
11 CH 29586, 13 CH 10423)**

Hon. Sophia H. Hall

DECISION

This matter comes on to be heard on the § 2-619.1 Motions to Dismiss filed by defendants Metropolitan Water Reclamation District, Maine Township and Park Ridge, hereinafter referred to as defendants or movants, unless designated by name. The parties have agreed that, at this time, this Court will only address the arguments that the claims against movants should be dismissed under § 2-615 because the Public Duty Rule applies to the allegations in plaintiffs' Amended Fifth Amended Complaint ("A5AC"). The Public Duty Rule provides that a public entity is not liable for its failure to provide adequate "governmental services," because the duty to provide such services is owed to the general public at large, and not to any particular plaintiff or plaintiffs. *Harinek v. 161 N. Clark St./Ltd Partnership*, 181 Ill. 2d 335, 345-47 (1998).

Plaintiffs allege that they experienced significant flooding to their homes after heavy rainfall in September 2008. Plaintiffs generally allege that movants' connection to and activities regarding the "Prairie Creek Stormwater System" (PCSS), over which they had jurisdiction and control, caused the flooding. Movants argue that the Public Duty Rule applies to the allegations

in the A5AC because, when considered in the light most favorable to plaintiffs, those allegations describe the provision of governmental services to the public at large.

A.
Applicable Law

Plaintiffs, first, argue that the law applicable to the motions to dismiss the A5AC is stated in *Van Meter v. Darien Park Dist.*, 207 Ill. 2d 359 (2003). The court in *Van Meter* did not discuss the Public Duty Rule. Rather, to address the defendant Park District's motion to dismiss, the court applied section 2-201 of the Illinois Tort Immunity Act, 745 ILCS 10/2-201, to the allegations in the complaint.

Section 2-201 provides that a public employee is immune from liability if the employee is exercising discretion in determining policy.

Except as otherwise provided by statute a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused.

In *Van Meter*, the plaintiffs alleged that the defendant Park District owned land upon which it was building a park. Its contractors constructed a storm water drainage and detention system to prevent flooding of the park, and so diverted the water from flowing in its natural course. The plaintiffs claimed that the Park District's system, designed to protect the park, caused water to back up and flood plaintiffs' adjacent real estate and residence. The Park District moved to dismiss, asserting that it was entitled to immunity under section 2-201 of the Tort Immunity Act. It asserted that its conduct was an exercise of discretion while it was engaging in a policy decision.

The Illinois Supreme Court found that the complaint failed to allege facts to show that the Park District's construction of the park and drainage system involved a section 2-201 policy decision, which the court defined as decision-making by a public employee weighing competing interests. *Id.* at 379-80. The court, however, did not discuss the application of the Public Duty Rule to the facts alleged in the complaint. Accordingly, this Court finds that the *Van Meter* case does not provide any guidance as to the application of the Public Duty Rule to the allegations in the A5AC.

Plaintiffs, second, argue that the Public Duty Rule no longer applies after passage of the Illinois Tort Immunity Act. The Tort Immunity Act abolished the doctrine of sovereign

immunity, and provided that government entities are liable in tort just like private tortfeasors. The Act then enumerated a number of exceptions to that general rule of liability.

The Illinois Supreme Court, in *Harinek v. 161 N. Clark St./Ltd Partnership*, 181 Ill. 2d 335 (1998), addressed the question of the continued viability of the Public Duty Rule after the passage of the Tort Immunity Act. The court found that the Public Duty Rule still applies to a public entity's provision of governmental services. The court found that the Act did not conflict with the Public Duty Rule, because the rationale for the Public Duty Rule is that the duty of a municipality to provide government services is owed to the public at large, not to any particular plaintiff.

According to the public duty rule, a municipality could not be held liable for its failure to provide adequate governmental services such as police and fire protection. *Huey v. Cicero*, 41 Ill. 2d 361 (1968). The rationale for this rule was that the duty of a municipality to provide governmental services was owed to the public at large and therefore took precedence over any duty owed to a particular plaintiff ...

As the court explained in *Huey*, the public duty rule exists "independent of ... common law concepts of sovereign immunity" *Huey*, 41 Ill. 2d at 363. Therefore, although, absent a statutory immunity, governmental units are now liable in tort on the same basis as private tortfeasors, the public duty rule nevertheless prevents such units from being held liable for their failure to provide adequate governmental services. *Id.* at 345.

The *Harinek* court went on to discuss the "special duty" exception to the Public Duty Rule. It acknowledged that if a particular plaintiff was under the direct control of the public entity at the time of actions or omissions causing damage, then the public entity might still be liable. The court cited its decision in *Huey v. Cicero*, 41 Ill. 2d 361, 363 (1968): "Exceptions to the [public duty] rule have been found only in instances where the municipalities were under a special duty to a particular individual..."

Though the *Harinek* court discussed the Public Duty Rule, the court did not ultimately apply it to the facts in that case. The affirmance of the dismissal of the complaint was determined by applying section 2-201 of the Tort Immunity Act to the alleged conduct of the defendant City of Chicago's Fire Marshal in conducting a fire drill.

The Public Duty Rule has been applied to the governmental service of maintaining sewers for the public at large. The court in *Alexander v. Consumers Ill. Water Co.*, 358 Ill. App. 3d 774, 779 (3d Dist. 2005), cited *Harinek's* discussion of the Public Duty Rule and the special

duty exception, in deciding an appeal from summary judgement for the defendant Village on the plaintiffs' claim for damages from a sewer backup. Plaintiffs sued the Consumers Ill. Water Co. and the Village of University Park. Plaintiffs claimed that the Village was aware of the possibility of sewer backups and took no action. In affirming the trial court, the appellate court relied on *Harinek* for the proposition that the Public Duty Rule provides that a public entity cannot be held liable for its failure to provide adequate government services. It applied the Rule to the plaintiffs' sewer backup claim.

The court then set forth the framework for analyzing whether the special duty exception applied to the facts in the case.

The special duty exception requires a finding that (1) the municipality was uniquely aware of the particular danger or risk to which the plaintiff is exposed, (2) there are allegations of specific acts or omissions on the part of the municipality, (3) the specific acts or omission are either affirmative or willful in nature, and (4) the injury occurred while the plaintiff was under the direct and immediate control of the employees and agents of the municipality. (Citation omitted). *Id.* at 779.

In affirming the trial court's grant of summary judgment in favor of the Village, the appellate court found that the evidence did not show that the Village had developed any special relationship with the plaintiffs.

Pursuant to these standards, this Court finds that the law regarding the Public Duty Rule applies to movants' motions to dismiss the A5AC.

B.

Application of the Public Duty Rule

To apply the Public Duty Rule to the facts alleged in the A5AC, this Court must, first, determine whether the conduct of the movants alleged in the A5AC as to the PCSS was a "governmental service," subject to the Public Duty Rule. This Court finds that providing flood control management is a governmental service to benefit the public at large.¹

¹ The First District Appellate Court also addressed the circumstances of governmental services regarding storm water and sewage in an unpublished decision, *River City Facilities Mgmt. Co., LLC v. Metro. Water Reclamation Dist.*, 2012 IL App (1st) 120464-U. In that case, the plaintiffs sued the District for flood damage that occurred after a heavy rainfall, alleging the District failed to utilize means to empty or drain storm water and sewage retention facilities prior to the storm, failed to monitor rising water levels, and failed to follow its own written guidelines. *Id.* at ¶ 4. The court first addressed the parties' arguments of whether the Public Duty Rule is still viable, which the court held it was. *Id.* at ¶ 25. The court, next, held that the Public Duty Rule applies to a governmental unit's provision of water management and collection. *Id.*

Plaintiffs argue that the A5AC alleges that the movants owned the infrastructure of the PCSS, which provides the flood control service, and that they failed to maintain and improve it, and, thus, the failure to maintain owned property caused the flooding of their properties. This Court finds that the allegations regarding the maintenance and improvement of the infrastructure of the PCSS are government services to the public at large. *See Donovan v. Village of Ohio*, 397 Ill. App. 3d 844, 850 (3d Dist. 2010) (holding that governmental service to the public at large, including maintenance, does not raise a duty). Accordingly, the Public Duty Rule applies to the allegations of failed maintenance of the owned infrastructure of the PCSS in the A5AC.

Since the Public Duty Rule applies to the allegations of the roles of the movants regarding the PCSS, for the A5AC to state a cause of action against movants, it must contain allegations of fact which, when viewed in the light most favorable to plaintiffs, support the application of the special duty exception as to each of the movants. Specifically, this Court must determine whether the A5AC contains allegations showing that plaintiffs were under the “direct and immediate control” of the movants at any point where it is alleged that movants committed any of acts or omissions of a willful nature.

Plaintiffs, generally, allege that their homes, located in the “Robin Court-Dee Road Community Area,” are affected by stormwater and sewage overflows from the PCSS. The PCSS structures alleged in the A5AC span across the towns of Park Ridge and Maine Township. Movant Metropolitan Water Reclamation District of Greater Chicago (“District”) is alleged to own and have control over the entire PCSS. Alternately, other defendants are variously alleged to own and control certain parts of the PCSS. (*See, e.g.*, A5AC ¶¶ 95, 354, 363, 388, 404, 504.) Plaintiffs allege that the PCSS has been developed over decades by those defendants who are public entities, and partly in coordination with the private defendants.

Around 1960, plaintiffs allege that movant Park Ridge and former defendant Cook County approved a “Robin Neighborhood Plat Plan” from the developer of the Robin Neighborhood. Plaintiffs allege that the Plat Plan granted “Drainage Easements” to movant District, movant Park Ridge, movant Maine Township, and former defendants Glenview, and/or the County. (¶ 66.3.) Plaintiffs allege that, pursuant to those easements, the following structures were approved that now exist within the PCSS: (1) the “undersized 60” Howard Court Culvert,” (2) the 120” Robin Court Culvert, less than 100 yards upstream of the Howard Court Culvert, (3) the 60” Robin Alley Culverts, less than 200 yards upstream of the Howard Court Culvert, (4) the Robin Neighborhood Main Drain, which “flows through the Robin Court Culvert but bottlenecks at the Howard Court Culvert,” (5) the 60” Robin Alley Stormwater Sewer, “now connected to the Dempster Basin, transporting stormwater from the Dempster Basin to the Robin Neighborhood Main Drain,” and (6) other “stormwater sewers tributary to the Main Drain.”

Plaintiffs further allege that, around 1961, movant Park Ridge and the County approved a similar Plat Plan for the Dee Neighborhood. Again, "Drainage Easements" were granted to the District, Park Ridge, Maine Township, Glenview, and/or the County. The Plan resulted in construction of what plaintiffs characterize as the "undersized 60" Dee Neighborhood Stormwater Pipe conveying the Dee Neighborhood Subsegment of the Robin-Dee Community Segment of the Main Drain" In addition, "tributary stormwater sewers" to the Main Drain were constructed.

At some time before 1987, movant Park Ridge constructed the "North Ballard Storm Sewers," which are north of Advocate's property. Those flowed to the Main Drain. Park Ridge also constructed the "North Ballard Storm Drain," which drains into the Main Drain.

Metropolitan Water Reclamation District

Plaintiffs' basic allegations against movant District are that it was vested with "sole power . . . to supervise and coordinate stormwater management across jurisdictions," and further that it "by either design control or operation control affects all upstream sanitary sewerage systems." Plaintiffs allege that the District, despite having knowledge of design and maintenance defects within the PCSS, failed to take "corrective measures to remedy and/or protect the Plaintiffs against the foreseeable dangerous conditions existing on its PCSS Properties posed by excess stormwater." Plaintiffs further allege that the District "negligently caused an accumulation of sanitary sewer water into citizens' homes from its sanitary sewage system." Finally, plaintiffs allege that the District approved "defective" plans from defendant Advocate relating to Advocate's design of PCSS components on its own property, which contributed to the 2008 flooding.

Plaintiffs nowhere allege, nor can it be inferred from their allegations, that any of them were at any time "under the direct and immediate control of the employees and agents" of the movant District. Thus, the A5AC contains nothing to support a cause of action based on application of the special duty exception to the District.

Maine Township

Plaintiffs generally allege that movant Maine Township had jurisdiction of the PCSS within Maine Township. Plaintiffs allege that Maine Township made no construction changes to the Howard Court and Dee Neighborhood Stormwater Pipe since the 1960s, despite knowledge of maintenance and design problems, and that its inaction failed to prevent known flooding risk to plaintiffs' property.

Plaintiffs further specifically allege that in the hours before the flooding on September 13, 2008, the Maine Township Highway Department had mobilized and/or readied trucks for sandbag delivery to the Robin-Dee Neighborhood, in anticipation of flooding from the predicted storm. However, plaintiffs allege the sandbags arrived too late, after the flooding had already occurred.

Plaintiffs' allegations do not support the special duty exception as to movant Maine Township. Plaintiffs allege that Maine Township undertook to obtain sand and sandbags, which they did not deliver to plaintiffs in time. However, the special duty exception only applies when the plaintiffs are under the "direct and immediate control" of the governmental employees or agents. Plaintiffs' allegations do not establish that any of the plaintiffs were under the "direct and immediate control" of Maine Township, such that a special duty was created. Furthermore, these allegations do not support a finding that Maine Township's conduct was for the particular plaintiffs, but was, rather, for the members of the communities at large.

Thus, the A5AC contains nothing to support a cause of action based on application of the special duty exception to movant Maine Township.

Park Ridge

Plaintiffs generally allege that movant Park Ridge owned, controlled, planned, and designed public improvements to the PCSS within its jurisdiction. Plaintiffs allege that Park Ridge knew of prior flooding of plaintiffs' property, and yet failed to take corrective measures to remedy or protect plaintiffs from the foreseeable dangerous condition posed by the PCSS. Plaintiffs further allege that Park Ridge was in the best position to make changes to plans submitted by defendant Advocate for work on the PCSS on Advocate's property. Particularly, plaintiffs allege that "Park Ridge did not compel Advocate [] to revise their North and South Development Plans to provide more stormwater storage"

Plaintiffs further specifically allege that on September 13, 2008, movant Park Ridge "deployed its police and/or Department of Public Safety to Dempster Road near the Plaintiffs' Robin-Neighborhood." The A5AC does not contain any further allegations about any actions those officers took, nor any allegations of how the officers' conduct contributed to the flooding of plaintiffs' homes, if at all, or involved any of them undertaking any task for any particular plaintiff.

Plaintiffs' allegations do not establish that the special duty exception applies to movant Park Ridge. Plaintiffs allege that Park Ridge deployed police officers on September 13, 2008, the day of the flooding, but do not include allegations describing the conduct of the police

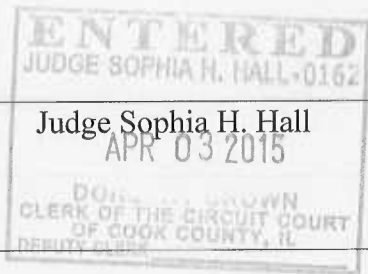
officers. Thus, it cannot be inferred that plaintiffs were under the “direct and immediate control” of any Park Ridge personnel at any time of an act or omission.

Thus, the A5AC contains nothing to support a cause of action based on application of the special duty exception to movant Park Ridge.

CONCLUSION

For the foregoing reasons, the Court finds that the Public Duty Rule applies to the allegations of the movants’ conduct in the A5AC. Furthermore, the Court finds that the allegations therein do not support the application of the special duty exception to the Public Duty Rule. Accordingly, plaintiffs have not alleged sufficient facts to infer the existence of an actionable duty on the part of these three movants, and the Motions to Dismiss are granted under § 2-615.

Entered: _____



Date: _____