

## POSSIBLY MORE LIABILITY PROTECTION FOR PROFESSIONAL ENGINEERS ENGAGED IN DESIGNING LAKE, STREAM AND STORM WATER MANAGEMENT

While many may not be aware, it is law in Wisconsin that when liability for negligence is established, the Wisconsin Supreme Court may nonetheless preclude liability based on public policy factors. The six public policy factors which the court employs are:

“(1) [t]he injury is too remote from the negligence; ... (2) the injury is too wholly out of proportion to the culpability of the negligent tort-feasor; ... (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; ... (4) ... allowance of recovery would place too unreasonable a burden on the negligent tort-feasor; ... (5) [to allow recovery] would open the way for fraudulent claims; or (6) to allow recovery would enter a field that has no sensible or just stopping point.”

The court is reluctant to apply those public policy factors to preclude liability in a case where the facts are too complicated until after a trial to the court or jury to resolve complex factual issues.

However, in Butler v. Advanced Drainage Systems, Inc., 2006 WI 102, 294 Wis. 2d 397, 717 N.W.2d 760, the Wisconsin Supreme Court ruled as a matter of law before trial that property owners on Shell Lake, Wisconsin, had no legal claim against the engineering firm who designed and engineered a system for diverting lake water, a pipe supplier that provided high density pipe to be used, and the contractor who installed the pipe, where the diversion plan and pipe failed. The property owners were assessed part of the costs and they complained of this lack of success. The city of Shell Lake hired an engineering firm to investigate the project and propose solutions, and its resulting report concluded that the pipeline's failure was caused by design and material defects, failure to test the materials and problems with installation. The City attempted the installation of a new system of pipe which had some success in lowering the water level of Shell Lake. The Shell Lake property owners brought their action against the original engineering firm,

the pipe supplier and the general contractor on the dual theories of negligence and private nuisance to recover the costs assessed to them.

The circuit court granted summary judgment dismissing the action and the Court of Appeals affirmed. The Wisconsin Supreme Court in reviewing the case concluded that the plaintiffs' negligence and private nuisance claims were precluded by public policy, explaining that for purposes of analysis the court would assume that the defendants' negligence was responsible for the failure in lowering the lake's water level and that the consequence of the high water level constituted a private nuisance to the lakeshore property owners, but that the six public policy factors would be employed to shield the defendants from liability.

In explaining its rationale, the court noted that it was probable that absent any act by the defendants, the plaintiff property owners nevertheless would have suffered damages. The court stated that were it to permit liability against the defendants, the court "would be opening the door to property owners' claims against any contractor who contracts with a municipality to remediate a naturally occurring hazard, when the contractor fails to completely abate the hazard's effects."

The court also concluded:

"Furthermore, permitting this claim to go forward would encourage lawsuits for any number of potentially negligent participants who have tried unsuccessfully to prevent flooding over the long history of the Lake's rising water levels. This is a natural hazard that was amplified by development on the Lake. Should every failed effort at controlling the flooding bring a lawsuit? For example, if a retaining wall had been constructed in the hope of holding off rising water and the property flooded nevertheless, should that contractor also be held responsible for the damage to the Plaintiff's or to neighboring residents' properties because the efforts were unsuccessful?"

The court applied the same rationale to both of the plaintiffs' negligence and private nuisance claims, explaining that a private nuisance must rest on either negligent or intentional conduct, and since this case was based on alleged negligence conduct, the nuisance claim must

fail as well as the negligence claim.

An independent contractor who follows government specifications is entitled to immunity where the government authority approved the specifications, the contractor's actions conformed to those specifications and where the contractor warned the governmental authority about the possible dangers associated with the specifications. This Butler v. Advanced Drainage Systems, Inc. decision expands potential immunity of independent engineering firms who not only follow government specifications, but who develop their own specifications in an effort to remediate or abate a specific condition of nature such as increasing or decreasing lake levels, or perhaps even storm water flooding. However, the reader should be careful in applying this 2006 case too broadly, because it rests upon the premise that the defendants were not liable for failing to remediate or abate a naturally occurring hazard. More often than not, an engineering firm would be called upon to remediate a condition that is not naturally occurring that may be the result of real estate improvements. Still, the case offers an expanding defense potential for professional engineers practicing in the field of lake, stream and storm water management.