

IS A TOWN LIABLE TO AN OWNER WHO GETS A FAULTY INSPECTION?

Municipalities routinely provide building inspection services and town government inspection services are often obtained through an independent contract with a private firm. Larger municipalities such as cities and villages often have building inspectors employed full time, but town government usually does not have a workload sufficient to justify full time employment of a building inspector. Towns, therefore, often obtain inspectors through contracts with independent firms, including engineering firms.

In the recent case of *Giffin v. Poetzl*, 2001 WI App. 207, 634 N.W.2d 901, the Court of Appeals of Wisconsin addressed the question of whether an aggrieved property owner whose contractor failed to build a residential home in accordance with the applicable dwelling code had a lawful claim of negligence against the town based on the alleged failure of the town's independent building inspection firm to uncover purported violations of the code by the contractor and its various subcontractors who constructed the home.

The applicable statute is found in §101.65 of the Wisconsin Statutes which covers the subject of municipal authority in enforcing the one- and two-family dwelling code in Wisconsin. The section relating to the question arising in this case states that a town:

(1) *May*: (a) *Exercise jurisdiction over the construction and inspection of new dwellings by passage of ordinances, provided such ordinances meet the requirements of the one- and 2-family dwelling code adopted in accordance with this subchapter...*

(2) *Shall contract with the department for those inspection services which the municipality does not perform or contract for... and reimburse the department for its reasonable and necessary expenses incurred in the performance of such services... (Emphasis added.)*

Before the circuit court, the town argued that it was not liable for the negligence of its independent contractor, a firm that sold the town inspection services. The circuit court thought that the statute was clear that the private firm providing the inspection services was performing such services as a town function and therefore the town may be liable for its independent contractor's negligence.

On appeal, the Wisconsin Court of Appeals agreed with the circuit court that the language of §101.65, Wis. Stats., was clear, but expressed the view that such "clarity was partially lost on the circuit court." (Even within the judiciary, small barbs are thrown now and then.)

The Court of Appeals held that while Chapter 101 of the Wisconsin Statutes requires a municipality such as a town to ensure the inspection of one- and two-family dwellings, the language of §101.65, Wis. Stats., unambiguously gives the town discretion to exercise jurisdiction over the construction of one- and two-family residences, and, if it chooses to do so, the town may either pay the state to perform the inspections, perform the inspections itself, or contract for the inspections. The Court of Appeals was satisfied that the town had authority under the statute to contract with a private firm for the performance of inspections.

The question remaining for the court was whether the inspectors are employees of the town or independent contractors. The court, looking at prior decisions, held that the most important single factor in answering this question was the degree to which the owner retained control over the details of the work. The court said, "The general rule is that an owner of a project under construction is not ordinarily liable for the negligence of an independent contractor." In citing that rule, the court referred to *Snider v. Northern States Power Company*, 81 Wis.2d 224, 260 N.W.2d 260 (1977), where Northern States Power was the owner of a nuclear generating plant which was under construction. Snider was a journeyman electrician employed by L.K. Comstock Company, a contractor selected by Northern States Power to do the electrical work. Snider was injured on the job, and contended that NSP retained control and supervision of the construction and therefore, NSP had a legal duty to Snider that was the same that Snider's employer owed to him. The Wisconsin Supreme Court disagreed with Snider and held that his employer was an independent contractor and based on the facts introduced at trial, held that NSP did not attempt to supervise or control the work carried out by L.K. Comstock. NSP's inspector only was concerned in

determining that the completed work conformed with the contract plans and specifications. The Court of Appeals in *Griffin v. Poetzel* decided that the decision of the Snider case should apply, but in doing so, ignored the fact that in Snider the owner was being sued, while in Griffin, the owner was suing. Giving the town the benefits of an owner, the court held that the town did not attempt to exercise detailed supervision over the work, the private firm providing the inspection services had contracts with several municipalities, and all employees of the private firm were supervised entirely by the firm rather than by the town. The court concluded that no town official had ever attempted to exercise any control over the decisions of the private inspection firm or its representatives during building inspections and held that the town was not liable for any negligence of the private firm providing the inspection services.

On the question of governmental immunity, the Court of Appeals noted that the inspection firm had not cross appealed on the grounds that it was entitled to immunity. Since the case was being remanded back to the circuit court for trial, the Court of Appeals suggested that perhaps the private firm may want to argue its entitlement to immunity under *State of Lyons v. CNA Insurance Company*, 207 Wis.2d 446, 558 N.W.2d 658 (Ct.App. 1996) where the Wisconsin Court of Appeals extended governmental immunity to private persons including independent contractors who contract with municipal authorities. The Lyons case was reviewed by this author in the May/June 1997 publication of Wisconsin Professional Engineer.

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