

GOVERNMENTAL IMMUNITY, WHEN DOES IT APPLY?

As I have previously noted in prior issues of this publication, the Wisconsin Statutes provide that no suit may be brought against any governmental subdivision, or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions. The Wisconsin Supreme Court has determined that if governmental immunity applies, “legislative, quasi-legislative, judicial, or quasi-judicial functions” are synonymous with “discretionary acts.” A discretionary act is one that involves an exercise of judgment when applying legal rules to the facts involved.

The statute granting immunity to governmental subdivisions and its officers, officials, agents or employees when exercising their discretion is not applicable to “ministerial acts.” To distinguish “discretionary” acts from “ministerial acts” may be difficult in some instances which then leads to litigation, but generally a “ministerial act” involves an act that is an absolute and certain duty imposed by law which usually prescribes the manner in which it is to be performed. The performance of a ministerial act does not require the use of judgment or discretion. In order to determine whether an act is required by “law” there must be an applicable statute, administrative rule, governmental policy or order setting forth the duty.

In *DeFever v. City of Waukesha*, a case decided by the Wisconsin Court of Appeals in November of 2007, the Court reviewed the Waukesha County Circuit Court’s refusal to permit a lawsuit to proceed based on governmental immunity. The Court of Appeals agreed with the Circuit Court.

In explaining its rationale, the Court of Appeals noted that the one issue for review was whether the City of Waukesha and the Waukesha Water Utility were immune from suit for negligence in failing to ensure that a water main was installed at the depth required by law. The plaintiff, DeFever, and other tenants of an apartment complex brought an action against the City

of Waukesha because a water main under an entrance ramp to the apartment complex ruptured, causing significant damage to the residents' property. The installing contractor had installed the water main according to Waukesha Water Utility specifications and the Wisconsin Department of Natural Resources had determined that the water main pipe should be installed at a minimum depth of five to seven feet. The onsite inspector confirmed that the water main was installed at a proper depth of eight feet. DeFever's experts determined that the water main break occurred at an elbow joint which was only three feet below the surface of the entrance ramp and was caused by freezing.

DeFever sued Waukesha for being negligent in the design and installation of the water main. The City of Waukesha moved for summary judgment arguing that governmental immunity barred DeFever's claim. Based on a 2005 decision of the Wisconsin Supreme Court in *Milwaukee Metropolitan Sewerage District v. City of Milwaukee*, 2005 WI 8, 277 Wis.2d 635, 652, 691 N.W.2d 658, the installation of the water main was a discretionary act and Waukesha was therefore immune from suit. DeFever also argued that Waukesha's engineers were guilty of negligent conduct in the design of the water main and that the general rule of governmental immunity should not apply to them under a recognized exception to governmental immunity for the acts of officers in the medical context. DeFever argued that in *Scarpaci v. Milwaukee County*, 96 Wis.2d 663, 686-87, 292 N.W.2d 816 (1980), the court held that a medical examiner's office was liable for conducting an autopsy on a child against the parent's wishes because the actual procedure of an autopsy, although discretionary in nature, was an exercise of medical discretion, not governmental discretion. In that case the court noted that the theory underlying the creation of immunity for governmental officials was to foster the fearless, vigorous and effective administration of policies of the government, which was not the objective

when applying the concept to the exercise of normal medical discretion during an autopsy.

In *DeFever v. City of Waukesha*, the Court of Appeals held that the medical exception for public officer immunity recognized in the medical context did not apply to engineers administering government policies when designing a water main system. The Court noted that the Supreme Court has refused to recognize a “professional” exception to the immunity rule beyond the medical context present in the *Scarpaci* case.

Once again, the appellate courts in Wisconsin have expressed the view that city engineers performing a governmental function enjoy the governmental immunity recognized by state statute and previous appellate court decisions. As I have noted in prior issues of this publication, that immunity also extends to engineers in private practice who are performing engineering work for governmental units where the governmental unit either sets the standard for the design or expressly approves the design furnished it by the engineers in private practice.