

GOVERNMENTAL IMMUNITY AND THE PERFORMANCE OF ENGINEERING SERVICES

From time to time, I have reviewed Wisconsin Supreme Court and Wisconsin Court of Appeals' decisions applying the doctrine of governmental immunity set forth in section 893.80(4) of the Wisconsin Statutes. That statute grants governmental immunity from suits when the governmental unit is exercising legislative, quasi-legislative, judicial or quasi-judicial functions. Case law in Wisconsin has clarified that a governmental body is immune from suit when performing such functions because it is engaging in a discretionary act. The immunity does not extend to merely ministerial acts. Further, the courts have extended it to protect private engineering and architectural firms performing work for governmental units who are merely carrying out the governmental discretion already exercised by the governmental unit. I addressed such an extension to the professional designer in the May/June 1999 issue of this publication.

In August of 2001, the Court of Appeals reviewed a case where 80 residents brought action against the City of Sheboygan alleging negligence and creating a private nuisance to recover damages for substantial water damage caused by the City of Sheboygan's failure to design and install an expanded storm water sewer system adequate for current needs. The city had retained two engineering firms to evaluate its system for conveying storm water drainage. The first report verified that the current system was inadequate, and the second study made further recommendations to the city regarding expansion of the system. After the studies were completed, the city entered into easements with several of the residents being served by the existing system, granting the city the right to construct and repair a new system and holding the city responsible for any wrongful or negligent act or omission in the course of such work.

The first of the two studies followed an abnormally heavy rainfall in 1986. The second study was conducted in 1988. No improvement of the storm water system was undertaken by the City of Sheboygan, and in August of 1998, there was an unusual and abnormally heavy rain causing substantial destruction of personal and real property. In some instances, the foundations of homes collapsed inward. In one case, the home collapsed entirely.

The residents affected commenced litigation following the August 1998 flooding, alleging numerous theories of liability including negligence and private nuisance. The trial court entered an order in favor of the city on the grounds that the design and approval of the sewer system was a legislative function protected by governmental immunity, under section 893.80(4) of the Wisconsin Statutes. The property owners appealed.

The residents' principal complaint was that the city failed to design, construct, maintain and operate a storm sewer system with sufficient capacity to drain storm water. They also claimed that the city was negligent in failing to follow the recommendations of the consultants it had retained. They offered the affidavit of an engineer who stated that had the city adhered to the recommendations made in one of the engineering reports, the homeowners would not have suffered property damage as a result of the 1998 rainfall.

The City of Sheboygan responded that even if the allegations were true the city was immune from liability because the acts of designing, planning and implementing a sewer system were legislative acts, protected by governmental immunity under section 893.80(4), Wis. Stats. The Court of Appeals agreed holding that the acts of designing, planning and implementing a sewer system were discretionary acts protected by the statute.

The property owners argued that the easements granted to the city waived the governmental immunity provided by the statute. The court reviewed prior decisions observing that a waiver of governmental immunity must be clear and express and concluded that there had been no such waiver. The court examined the language in the easements and found no express waiver of immunity but merely the expression of the city's willingness to be liable for negligent acts occurring during the work allowed by the easements. The court held that under the easements, the city would be liable to the property owners for any negligent trenching or laying of pipes but not for inadequate planning and designing of the sewer system itself.

The property owners also asserted that the city had permitted a dangerous condition to exist by not increasing the capacity of the storm sewer system. The court found no legal precedent in case law placing a duty upon a municipality to keep its sewer system current with developing needs. The court concluded that the remedy for the city's residents reposed in their power to vote rather than in the judicial system.

The property owners also argued that the governmental immunity did not extend to the performance of professional skills and argued that it did not extend to the city engineer, citing a prior Wisconsin case where the court had held that governmental immunity does not extend to medical decisions of medical personnel employed by a governmental body. The court refused to extend that exception to governmental immunity to professionals outside of the medical field. It stated: "We are not inclined to apply the exception to the city engineer in this case. Whether or not he is a 'professional' for purposes of the exception, he had no design-making authority for the design and installation of the Second Creek sewer system. Absent the exercise of independent professional discretion, any acts of the city engineer involved governmental discretion and are protected by immunity."

The property owners also asserted that the city had created and maintained a private nuisance not protected by governmental immunity. The court held that the city would be guilty of an actionable private nuisance if it collected rainwater and then after taking possession of it subsequently discharged the water onto adjoining properties, causing damage. However, the court held that a city is not obligated to build a sewer at all or to build one large enough to carry away all the rain that falls. Accordingly, the court concluded that the city was not liable on the theory of private nuisance.

This case represents a good example of how the court applies the doctrine of governmental immunity on matters involving the purchase or performance of engineering services. However, this story may not be over. The Wisconsin Supreme Court granted the property owners' petition for review, and the Wisconsin Supreme Court will probably issue its decision sometime this summer.

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