COURT OF APPEALS DECISION DATED AND FILED

December 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 98-0660

STATE OF WISCONSIN **IN COURT OF APPEALS DISTRICT III**

HAROLD L. JOHNSON AND DALLES HOUSE MOTEL, INC.,

PLAINTIFFS-RESPONDENTS,

V.

DON DAHLE, MARK HUGHES AND JAMES LARSON,

DEFENDANTS-APPELLANTS,

GENE MCDONALD AND SCOTT WEYANDT,

DEFENDANTS,

AMERICAN MATERIALS CORPORATION AND WAUSAU UNDERWRITERS INSURANCE CO.,

DEFENDANTS-CO-APPELLANTS.

APPEAL from a judgment of the circuit court for Polk County: ROBERT H. RASMUSSEN, Judge. *Affirmed in part; reversed in part.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. American Materials Corporation, its insurer and three state employees appeal a judgment awarding $314,048.55 to Dalles House Motel, Inc., and its owner, Harold Johnson, for flood damage to the motel that occurred when unusually heavy rains fell during road construction. The jury found that American Materials, the construction company, and the three Department of Transportation engineers negligently planned or executed the construction. The dispositive issue concerning the state employees is whether public employee immunity bars a tort claim against them for their discretionary decisions. We conclude that they enjoy immunity for the acts alleged in the complaint and, therefore, reverse the judgment as to them. American Materials does not share that immunity because it did not timely plead immunity, and the trial court properly exercised its discretion when it denied permission to amend the pleadings. American Materials also argues that recovery is barred under § 88.87, STATS., and that the plaintiffs presented insufficient evidence to sustain a finding of negligence or causation. We reject these arguments and affirm the judgment as to American Materials and its insurer.

As a part of the construction project, American Materials removed an elevated piece of land that had been a railroad embankment. It also stripped the area of vegetation and did not implement appropriate erosion control measures required to support the storm water management system. On the evening of January 19, 1994, an extraordinary rainstorm deposited between 3.87 inches and six-plus inches of rain in one and one-half to two hours, depending on which witness the jury believed. The jury found that the negligent construction, not an “act of God,” caused the water damage to the motel.

The state's engineers enjoy immunity for their discretionary but not their ministerial acts. *See* ***Barillari v. City of Milwaukee***, 194 Wis.2d 247, 257, 533 N.W.2d 759, 763 (1995). Discretionary acts are those that involve the exercise of judgment or discretion rather than merely performing prescribed tasks. A ministerial duty is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion. *See* ***Kimps v. Hill***, 200 Wis.2d 1, 10-11, 546 N.W.2d 151, 156 (1996). The DOT engineers were required to use their judgment regarding how much open land was "too much" and when storm sewers or other alternative erosion and flood control measures should be implemented. No law or regulation prescribes or defines the engineers' duties with such precision as to create a ministerial duty.

Johnson argues that the engineers' negligence comes within the "known dangers" exception recognized in ***Cords v. Anderson***, 80 Wis.2d 525, 541, 259 N.W.2d 672, 679 (1977). In ***Cords***, the court held that a park manager had an absolute, certain or imperative duty to place warning signs or close a dangerous public trail. The manager knew that people regularly used the trail at night and that it passed a few inches from a ninety-foot gorge. The court held that the park manager had a ministerial duty to erect signs warning of an obvious danger because there "can be no policy of leaving it alone when such an obvious danger exists." ***Id***. at 538, 259 N.W.2d at 678. The known danger exception does not apply to the engineer's discretionary decisions in this case. Neither the likelihood nor the severity of the harm presented here is comparable to ***Cords***.

Johnson also argues that § 32.18, STATS., constitutes a waiver of immunity. That statute waives governmental immunity. No governmental entity

was named as a defendant in this action. Section 32.18 has no application to a claim of public employees discretionary immunity. Because the engineer's actions were not ministerial in nature and do not come under the known danger exception, we reverse the judgment as to the DOT employees.

American Materials attempted to assert the same immunity by amending its answer four days before the week-long trial was scheduled to begin. At the time the initial answer was filed and the deadline for amending pleadings lapsed, the case law that allows a government contractor to assert immunity had not been released. *See* ***Lyons v. CNA Ins. Co.***, 207 Wis.2d 446, 457, 558 N.W.2d 658, 663 (Ct. App. 1996). That opinion was released in December, 1996, and ordered published January 31, 1997. American Materials did not attempt to modify its answer until August 14, 1997, and offers no explanation for the delay. A defense based on ***Lyons*** would require the parties to present evidence regarding the DOT's approval of reasonably precise specifications, American Materials' actions conforming to those specifications and its warning to the DOT about possible dangers associated with the specifications that were known to American Materials but not known by DOT officials. ***Id***. The trial court properly exercised its discretion when it refused to allow eleventh-hour amendment of the pleadings to raise new issues about which specific discovery had not occurred.[1] ***State v. Peterson***, 104 Wis.2d 616, 634, 312 N.W.2d 784, 793 (1981). Because immunity was not properly pleaded, it was waived. *See* ***Anderson v. City of Milwaukee***, 208 Wis.2d 18, 34, 559 N.W.2d 563, 570 (1997).

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[1] American Materials argues that the plaintiffs were not prejudiced as they were already on notice that American Materials believed it shared governmental immunity. American Materials had argued that it shared governmental "immunity" created by § 88.87, STATS. The claim that an entity shares one type of immunity does not constitute a claim that it shares another type of immunity that depends on other factors.

American Materials does not benefit from § 88.87(2)(c), STATS., which allows a property owner to bring an action in inverse condemnation under ch. 32, STATS., or sue for relief, "other than damages." American Materials argues that this statute precludes an action for damages. The statute applies to cities, villages, towns, counties, railroad companies, and the DOT. It allows recovery in inverse condemnation against those governmental entities. On its face, it does not apply to a private entity for negligent acts that occur during a construction project.

American Materials argues that the plaintiffs failed to present expert testimony regarding the appropriate standard of care for the design or construction of a highway project and that expert testimony was necessary because the subject matter is too complex for the jury to decide without the benefit of such testimony. It further argues that the plaintiffs' expert, James Merila, lacked the appropriate expertise to inform the jury of the standard for design and construction of a highway in Wisconsin. Expert testimony is required only when an issue is unusually complex or esoteric and not within the realm of the ordinary experiences of mankind. *See* ***Weiss v. United Fire & Cas. Co.***, 197 Wis.2d 365, 379, 541 N.W.2d 753, 757 (1995). Much of the plaintiffs' case is based on common sense principles that do not require expert testimony.

To the extent expert testimony was required, Merila's credentials withstand American Materials' challenge. He is a civil engineer with education and training in the design of streets, highways, utilities and public facilities. He was employed by two different cities as a project engineer and chief engineer for public improvements such as the construction of streets, sewers and water mains. In addition, the defendants' experts provided the jury with substantial evidence regarding the standard of care. Merila's conclusions that American Materials: (1) did not adequately address the problem of water volume and flow of storm

water during construction; (2) had no strategy to prevent damage after removal of the railroad embankment; (3) failed to insure that water running downhill on the north side of Highway 8 would stay on the north side instead of crossing the highway; and (4) stripped too much vegetation at one time constitute an adequate basis for the jury's finding that American Materials was negligent.

American Materials also argues that the plaintiffs presented insufficient evidence on the question of causation. Its argument is substantially based on the false premise that the jury was required to find that the flood resulted from a "100 year storm." While various witnesses, some with an interest in the outcome, testified to extraordinary amounts of rain in a short time, the jury was free to reject the assertion that "unprecedented rain" caused the flooding. The jury heard conflicting evidence concerning the amount of rainfall and the period over which it occurred. More significantly, witnesses testified that the flooding began before the rain stopped. Therefore, American Materials' negligence could have caused the flooding after a less severe storm.

By the Court.—Judgment affirmed in part; reversed in part.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.