COURT OF APPEALS
DECISION
DATED AND FILED

December 12, 2000

Cornelia G. Clark
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* WIS. STAT. § 808.10 and RULE 809.62.

No. 99-3126

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

JOSEPH AND JUNE ALBERT, DIANE RICHTER AND WILLIAM AND GRACE SCALE,

PLAINTIFFS,

DELBERT BLOOR, MARY ANN BLOOR AND JEFF BLOOR, PHILIP CARUSO, JR., AND JUDY CARUSO, MICHAEL AND DEBORAH CHAMBERS, LORRAINE DAVIES, PHILLIP AND COLLEEN DEVLIN, THOMAS AND SHERÓN EBERT, DAVID AND LAURALEE EGLI, CHRISTINE FERRIS, PAUL AND LISA FIX, LEON AND PATRICIA FRISKE, RITA FRONCZAK, DAVID AND JULIA GARD, BRETT AND MARY BETH GARRETT, CHRIS AND LYNN GIELDON, PETER AND JACQUELINE HEMMER, DIMITRI KAMOLOV, ARDEN AND RENEE KNOLL, HUBERT AND MAE KRAWCZYK, JAMES AND MARILYN LAVESSER, WALTER AND EMILY LUCZAK, RICHARD MALLINGER, ANTHONY AND RANAE MANE, DARELD MATTER, OTTO MARTENS, KENNETH MULTHAUF AND GREGORY MULRY, RICHARD AND NGOC PARADOWSKI, THADDEUS AND JEAN PELZEK, JOHN AND VIRGINIA

PENNEBECKER, THOMAS AND ESTELA PRUST, ERVIN AND BERNICE PRUST, WILLIAM AND GRACE QUIRK, JAMES RICHTER, JOANNE RICHTER AND PATRICK RICHTER, EMILY RYBECK, JEFFREY AND CYNTHIA SALISBURY, STEVE SCHRAMKA FUNERAL HOMES, INC., GREGORY AND JUNE SIECH, JAMES AND MICHELLE SKROBIS, DAVID AND CHRISTINE URBANIAK, CECELIA WISNIEWSKI, FAITH YUMANG AND KATHERINE ZIELSKI,

PLAINTIFFS-RESPONDENTS,

V.

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,

DEFENDANT-APPELLANT.

JAMES J. AND MYRTLE R. CUDA, GAYLORD GUGIN AND ROBERT AND ANITA PIETRYKOWSKI,

PLAINTIFFS,

JESSE C. AND LYNN M. BENISH, CAL A. FLOOD, FRANCIS J. KNIPPEL, JOHN AND KATHLEEN MUNZINGER, HENRY PACUT, MARY E. PARKER, TYLER AND MARY PIORIER, THOMAS MORE HIGH SCHOOL, JAMES AND NOREEN WILEY, EVELYN WILKER AND FRANCES ZAHN,

PLAINTIFFS-RESPONDENTS,

V.

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. The Milwaukee Metropolitan Sewerage District (MMSD) appeals from the circuit court judgments in favor of Delbert and Mary Ann Bloor and numerous other plaintiffs-respondents. MMSD presents several arguments, all of which we reject. Accordingly, we affirm.

BACKGROUND

¶2 On August 28, 1995, backups of raw sewage occurred in numerous buildings in the cities of Cudahy, Milwaukee, and St. Francis. On May 24, 1996, seventy-four individuals and one business filed a lawsuit against MMSD regarding the sewage backups. The complaint was amended, adding two more individuals as plaintiffs. On January 23, 1998, eleven other individuals and one school filed a different lawsuit against MMSD regarding the sewage backups of August 28, 1995. That complaint was amended twice, adding a total of eight more individuals as plaintiffs.

¶3 The complaints for both lawsuits alleged that the sewage backups resulted from MMSD's "negligence in failing to properly inspect, maintain and/or operate its sewerage system," and that the backups constituted negligent trespass. They asserted that as a result of MMSD's conduct, each plaintiff suffered at least one injury, including but not limited to destruction and/or loss of personal property, temporary loss of use of the affected premises, loss of income, physical

illness "including, but not limited to, nausea and infection," and "annoyance and inconvenience." In its answers to the complaints, MMSD denied that "raw sewage back-up was the result of [its] negligence in failing to properly inspect, maintain and/or operate its sewage system." The only affirmative defense pled by MMSD was that "the amount recoverable by any individual person, proceeding jointly or severally, shall not exceed $50,000, pursuant to sec. 893.80(3), Wis. Stats."

¶4 The cases were consolidated for trial. In an unsigned motion in limine attached to its pretrial report, MMSD asked the court for an order "restricting the plaintiffs from introducing any testimony of negligence relating to the lack of a back-up power source at the MMSD diversion structure located at the intersection of S. Kinnickinnic and E. Lunham Avenues in the City of St. Francis on August 28, 1995." At the status conference of October 15, 1998, MMSD stated, for the first time, its position that its decision not to provide backup power at the diversion structure was a design decision and "the statutes, namely 893.80(4), provide for immunity to the MMSD for design decisions which are discretionary decisions which are quasi-legislative." At a hearing just prior to the beginning of the trial, the court denied MMSD's motion in limine. The trial, on the issue of liability only, began on October 26, 1998, and the jury returned its special verdict on November 6.[1]

¶5 Seven special verdict questions dealt with the diversion structure. On Question 1, the jury found that the decision not to equip the diversion structure

[1] The plaintiffs chose not to pursue the cause of action for negligent trespass. On November 4, 1998, the circuit court granted MMSD's motion for dismissal of plaintiffs Joseph and June Albert, William and Grace Scale, Robert and Anita Pietrykowski, and Gaylord Gugin. The circuit court did not grant MMSD's motion for dismissal of plaintiff Diane Richter. The record on appeal does not establish the ultimate status of plaintiffs James and Myrtle Cuda.

with secondary power prior to August 28, 1995, was an operational decision. On Question 2, the jury found that MMSD was negligent in failing to provide the diversion structure with a secondary power source before August 28, 1995. On Question 3, the jury found that this negligence was a cause of the sewage backup into the properties of all except one of the plaintiffs listed (Diane Richter). Because the jury found, on Question 4, that MMSD was not negligent in failing to override the diversion structure's computer program to allow a diversion from Jones Island to South Shore prior to the loss of power at 9:37 a.m. on August 28, 1995, it did not have to answer Question 5. On Question 8, the jury found that MMSD was negligent in failing to divert the sewage flow from Jones Island to South Shore at the diversion structure in a timely manner on August 28, 1995. On Question 9, the jury found that MMSD should have diverted the sewage flow from Jones Island to South Shore at the diversion structure at 12:00 p.m.[2]

¶6 Four special verdict questions dealt with a bypass gate. On Question 6, the jury found that MMSD was negligent in failing to test the gate on a regular basis before August 28, 1995. On Question 7, the jury found that this negligence was a cause of the sewage backup into the premises of all plaintiffs listed. Because the jury found, on Question 10, that MMSD was not negligent in failing to open the bypass gate in a timely manner on August 28, 1995, it did not have to answer Question 11.

¶7 Motions after verdict were filed by both the plaintiffs and MMSD. The court granted one of the plaintiffs' motions, ruling, as a matter of law, that because the jury found that MMSD's decision not to equip the diversion structure

[2] Question 9 erroneously refers to August *25*, 1995, rather than to August *28*, 1995.

with secondary power prior to August 28, 1995, was an operational decision, governmental immunity could not apply to MMSD. The court denied the plaintiffs' other motions and all of MMSD's motions. The parties subsequently agreed on the amount of damages to be awarded to each plaintiff; judgments were entered accordingly.

DISCUSSION

¶8 MMSD first argues that the circuit court erred by "refusing to conduct its own pre-trial evidentiary hearing to determine whether the failure to provide a back-up source of power at the Lunham structure was a discretionary design decision entitling [MMSD] to governmental immunity." It claims that the court "refused to analyze the nature of [the] function being challenged and, in effect, allowed a jury to decide when or whether municipal tort immunity should apply, based on its perception of operation or design as aided by plaintiffs' expert."

¶9 The respondents contend that we need not decide this issue. They explain:

> This Court could take away the jury verdict finding that MMSD was negligent in failing to provide the diversion structure at KK and East Lunham with a secondary power source before August 28, 1995, and it will have no effect on the Judgments entered in this case.
>
> On the Special Verdict returned on November 6, 1998, there was an additional and totally separate jury finding of MMSD negligence relating to the same diversion structure at KK and East Lunham. This was a finding that MMSD was negligent on August 28, 1995, in failing to divert the flow of sewage from Jones Island to South Shore at the diversion structure at KK and East Lunham in a timely manner. This finding stands on its own because it has nothing to do with power to the structure, whether it be primary or secondary. The diversion to South Shore could have been accomplished by manually moving the gates

> within the diversion structure. In fact, the diversion was accomplished manually later in the afternoon of August 28, 1995. The finding of negligence for failing to accomplish this in a timely manner on August 28, 1995, has nothing to do with the lack of secondary power. This finding was not appealed by MMSD.

(Record references omitted.) The respondents also assert:

> MMSD has not appealed the jury's verdict concerning the operational versus design question, and also has not appealed the jury's finding of negligence for MMSD failing to provide a secondary power source at the diversion structure. The only thing that has been appealed was the Court's decision to submit the operational versus design question to the jury. Under ***Menick*** [***v. City of Menasha***, 200 Wis. 2d 737, 547 N.W.2d 778 (Ct. App. 1996) (holding that "operating and maintaining" sewer system does not fall within immunity provisions of WIS. STAT. § 893.80 because although "decision to install and provide" sewer system is discretionary, "there is no discretion as to maintaining the system so as not to cause injury to residents")], this decision was correct.

Additionally, the respondents argue that "[e]ven if the Court should rule that, as a matter of law, the lack of secondary power was a design decision, [MMSD] should not be entitled to immunity because it waived the defense of immunity by not pleading it as an affirmative defense," and by not moving to amend its pleadings. The respondents are correct.

¶10 WISCONSIN STAT. § 893.80(4) provides immunity to MMSD "for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions." *See* WIS. STAT. § 893.80(4) (1995-96). "Quasi-legislative" or "quasi-judicial" acts are synonymous with "discretionary" acts. ***Scarpaci v. Milwaukee County***, 96 Wis. 2d 663, 683, 292 N.W.2d 816 (1980). *Discretionary immunity, however, "is an affirmative defense that is deemed waived if it is not raised in a responsive pleading or by motion."* ***Anderson v. City of Milwaukee***, 208 Wis. 2d 18, 34, 559 N.W.2d 563 (1997) (emphasis added); *see also* WIS. STAT. § 802.06(2) (1995-96).

¶11 MMSD offers two replies. First, it claims that "the question of the availability of the discretionary governmental immunity defense is solely a judicial determination" and, therefore, "the jury verdicts on these two issues [the operation versus design question and the finding of negligence for failure to provide a secondary power source at the diversion structure] are nullities and must be set aside." Second, it claims that it "should not have to plead the defense of discretionary governmental immunity from alleged design negligence if design negligence has not been pleaded by the Plaintiffs." MMSD, however, fails to cite any legal authority in support of either of these contentions, *see* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980) (appellate court need not consider arguments unsupported by legal authority), and fails to offer anything that would counter the respondents' invocation of the supreme court's declaration that "discretionary immunity is an affirmative defense that is deemed waived if it is not raised in a responsive pleading or by motion," ***Anderson***, 208 Wis. 2d at 34; *see also* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted argument deemed admitted). Accordingly, we deny MMSD's request for remand for an evidentiary hearing on whether it was entitled to governmental immunity.

¶12 MMSD also contends that the circuit court erred in not admitting testimony from its expert regarding the rate of flow of sewage backup into the plaintiffs' premises. Using the terms "sewerage backup" and "flooding" interchangeably in its brief, MMSD argues that the excluded testimony is relevant to causation because it would have afforded the jury "the opportunity to evaluate the impact of the alleged MMSD negligence against the impact of the basement flooding that occurred as a result of the storm and the unlikely failure of the two structures [the diversion structure and the bypass gate] within a few minutes of

each other." MMSD also contends that the excluded testimony "was to prove that by approximately 2 o'clock p.m. on the day in question, the plaintiffs, based on their location, already had so much basement flooding that any flooding as a result of MMSD negligence could not be a substantial factor *in causing plaintiffs' damages*." (Emphasis added.) Thus, MMSD maintains, it is "entitled to a new trial on the issue of causation, to fully present its evidence that it should not be held to be ***the*** *legal* ***cause*** *of plaintiffs' damages*." (Emphases added.) MMSD is incorrect.

¶13 We will uphold a trial court's discretionary decision to exclude evidence if it has a reasonable basis, was made by applying a proper standard of law, and is supported by the record. ***State v. Jenkins***, 168 Wis. 2d 175, 186, 483 N.W.2d 262 (Ct. App. 1992). The party seeking admission of evidence bears the burden of showing why it is admissible. ***Id.*** at 188.

¶14 Relevant evidence generally is admissible. WIS. STAT. § 904.02 (1997-98). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." WIS. STAT. § 904.01 (1997-98). MMSD did not meet its burden of showing that, in the liability phase of this bifurcated trial, the rate of flow of sewage backup was relevant to the jury's determination that MMSD was negligent in failing to provide the diversion structure with secondary power and this negligence was ***a cause*** *of the sewage backup*.

¶15 During the trial, the circuit court stated:

> I think the issue has to be narrowed to the question whether the negligence caused *the sewage backup*. The Court's going to hold [that] the amount of sewage backup … and the times are not relevant; and, if they are relevant, it would

> … cause confusion to the jury when you go back and determine the cause questions and the negligence questions[;] and this is the problem with a bifurcated trial.

(Emphasis added.) During the hearing on postverdict motions, the court reaffirmed its ruling:

> [M]y finding was that the rate of sewerage was not material as to the issues of negligence whether any sewerage whatsoever was in the basement, … I believe my ruling was that it is possible and most likely that this issue, the rate of sewerage, would be material as to damage.… [T]he rate of sewerage was not material at this point or at this part of the trial.

The circuit court was correct.

¶16 MMSD ignores the fact that the liability phase of the bifurcated trial encompassed negligence only, not damages. To establish negligence, as our supreme court has explained,

> a plaintiff must prove: (1) the existence of a duty of care on the part of the defendant, (2) a breach of that duty of care, (3) a causal connection between the defendant's breach of the duty of care and the plaintiff's injury, and (4) actual loss or damage resulting from the injury.

Gritzner v. Michael R., 2000 WI 68, ¶19, 235 Wis. 2d 781, 611 N.W.2d 906. MMSD seems to misconceive what the plaintiffs had to establish in order to prove that it was negligent. For example, in its reply brief, MMSD maintains:

> The effect of the exclusion of this testimony was to deprive the MMSD of the opportunity to demonstrate to the jury that the enormous amount of sewerage back-up cause[d] by the joint failure of the diversion and by-pass structures without any MMSD negligence prevented the limited amount of sewerage back-up that could arguably be attributed to alleged MMSD negligence from being ***the cause*** *of Plaintiffs' damages*.

(Emphases added.) But whether MMSD was "the cause" was not the issue and, indeed, that was not the question submitted to the jury. The jury found, on Question 2, that MMSD was negligent in failing to provide the diversion structure with secondary power, and found, on Question 3, that this negligence was ***a cause*** *of the sewage backup*. The jury also found, on Question 8, that MMSD was

negligent in failing to divert the sewage flow at the diversion structure in a timely manner.

¶17 Thus, as the respondents correctly argue:

> There was only one cause issue before the jury in the case below. The question to be determined by this jury was whether or not the negligence of MMSD caused the sewage backups in plaintiffs' basements.… MMSD wanted to introduce testimony about the rate of sewage backup to argue that no matter what MMSD did on August 28, 1995, plaintiffs would have had damage. The issue of plaintiffs' damages was to be addressed in the second phase of this trial.

Expert testimony regarding the rate of flow of sewage backup was not relevant. Therefore, the court did not erroneously exercise discretion in excluding such evidence from the liability phase of the trial.

¶18 Finally, MMSD argues that "[o]ne last reason for a new trial on causation is the fact that … there is no causation question connecting the negligence [found on Question 8] to the sewerage back-ups." It points out: "[Question 3] clearly limits its focus to a sewerage back-up caused by the failure to have a secondary power source. It does not serve as a causation nexus for all acts of negligence. Its impact is clearly limited to the negligence discussed in Question Two, not Question Eight." Although MMSD's conclusion regarding the impact of the jury's finding on Question 3 is correct, it is a moot point because it has no practical effect on the controversy. *See* ***City of Racine v. J-T Enters. of Am., Inc.,*** 64 Wis. 2d 691, 700, 221 N.W.2d 869 (1974).[3]

[3] As we mentioned, the respondents correctly pointed out that the jury found MMSD causally negligent on Question 3 and that MMSD did not challenge any of the jury's findings on appeal; MMSD only appealed the circuit court's decision to submit to the jury Question 1—the operational/design question. Thus, as the respondents argue, even if the negligence established in Question 8 was not causally connected to the sewage backups, the negligence established in Question 3 was. MMSD offers nothing to counter the respondents' argument. *See* ***Charolais*** (continued)

By the Court.—Judgments affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (1997-98).

Breeding Ranches, Ltd. v. FPC Sec. Corp., 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments deemed admitted). The jury found causal negligence; MMSD stipulated to the damages. MMSD has failed to offer any basis for a new trial.