COURT OF APPEALS DECISION DATED AND FILED

November 23, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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.**

Appeal No. 2004AP3125

Cir. Ct. No. 2003CV1838

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

MCCULLOUGH PLUMBING, INC.,

PETITIONER-APPELLANT-CROSS-RESPONDENT,

V.

VILLAGE OF MCFARLAND, ALLAN COVILLE AND SCOTT MILLER AND ERIC THORSEN,

RESPONDENTS-RESPONDENTS-CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from orders of the circuit court for Dane County: DAVID T. FLANAGAN, III, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Dykman, Deininger and Higginbotham, JJ.

¶1 DYKMAN, J. McCullough Plumbing, Inc., appeals from a series of orders relating to a plumbing permit which concluded that the Village of

McFarland, Allan Coville, Scott Miller, and Eric Thorsen (the Village) are entitled to governmental immunity from tort damages. The Village cross-appeals from an order granting McCullough's petition for a writ of mandamus relating to the non-production of requested documents under the public records law, WIS. STAT. § 19.35 (2003-04),[1] and awarding it damages and fees pursuant to WIS. STAT. § 19.37. We affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

FACTS

¶2 In 2002, McCullough contracted to install a water lateral for a building in the Village of McFarland. The parties dispute whether the water lateral was to be used solely as a fire protection system, or whether it had a mixed purpose as both a fire protection system and a lateral bringing potable water into the building. McCullough intended to use six-inch diameter high density polyethylene (HDPE) pipe. The cost of installing HDPE pipe is significantly less than the cost of most other pipes. This was reflected in McCullough's bidding price for the contract. In August 2002, McCullough applied to the Village for a permit to install the water lateral for "fire service" to 4603 Triangle Street. The permit was approved by the Village's Plumbing Inspector on September 5, 2002, subject to two conditions: (1) that the plumbing materials and installation met the Village of McFarland's specifications, and (2) that the water lateral pass inspection by the Public Works and Fire Department. McCullough then began to construct the water lateral using HDPE pipe.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶3 In October 2002, Scott Miller and Allan Coville, acting on behalf of the Village, told McCullough that it was not allowed to install plastic/PVC pipe for a water lateral by a "Village of McFarland ordinance." Miller told McCullough that ductile iron pipe was required for the installation. McCullough temporarily agreed to this plan and halted the installation. At some point, McCullough gave a sample of the HDPE pipe the company intended to use to the Village in an attempt to convince the Village to allow McCullough to use the HDPE pipe. The parties dispute whether the Village gave McCullough an opportunity to appear before the Village's Public Utilities Committee, or whether the Village would have allowed McCullough a chance to use HDPE pipe rather than ductile iron pipe. Regardless, by November 2002, without seeking further review of the matter, McCullough completed the project on Triangle St. using ductile iron piping. McCullough claims that it incurred $19,205.76 in additional costs that it was unable to recover under its contract because it used ductile iron piping instead of HDPE piping.

¶4 On April 1, 2003, McCullough made an open records request to the Village for information relating to the village ordinance that required ductile iron piping. The Village prepared a response to the request, but through a miscommunication McCullough never received this response. On June 19, 2003, McCullough filed this lawsuit requesting (1) tort damages for preventing McCullough from using HDPE piping, (2) a writ of mandamus for failing to respond to the April 1, 2003 open records request, (3) a writ of mandamus ordering the Village to accept all piping allowed under Wisconsin's uniform plumbing code, WIS. STAT. § 145.02(2), and (4) a civil rights claim under § 42 U.S.C. 1983. On July 10, 2003 the Village responded to McCullough's open records request.

¶5 In October 2003, the circuit court denied McCullough's mandamus claims. The court held that the open records claim arose from an innocent miscommunication, and was moot because the Village had sent its response to McCullough. The court also held that a writ of mandamus could not be issued to force the Village to accept HDPE piping if it is acceptable under the uniform plumbing code established by WIS. STAT. § 145.02(2). The court reasoned that granting a writ of mandamus is for the immediate present, to stop a problem that is happening now, not to correct a mistake in the past or prevent one in the future. McCullough had already installed the ductile iron pipe, and thus the writ of mandamus would only apply to future acts. The court also noted that McCullough had other proper remedies, such as tort damages. Finally, the court ruled that, although the claim for mandamus to enforce the uniform plumbing code claim was not a proper remedy, the court would construe it as an action seeking declaratory judgment.

¶6 On January 5, 2004, responding to McCullough's motion for partial summary judgment on the action for declaratory judgment, the circuit court concluded that the Village of McFarland did not have an ordinance requiring ductile iron piping to be used, and thus unlawfully required that McCullough use ductile iron piping. The court stated further that:

> Any Village practice or policy of requiring that only ductile iron pipe be used for water service piping from the outside or proposed outside foundation walls of any building to the main or other water utility service terminal within the boundary of or beneath an area subject to easement for highway purposes and its connections would be in violation of Sec. 145.02(2), Wis. Stats.

¶7 On January 28, 2004, McCullough made an additional public records request with the Village of McFarland. The Village sent a response on February 5,

2004, but did not refer to any records having been withheld, or any basis upon which records would be withheld. On March 4, 2004, McCullough made another request for public record documents with the Village of McFarland. Additionally, on March 5, 2004, McCullough made an oral request for further public record documents. The Village sent a response to the March 4 and 5 requests containing documents, but the Village also stated that they were withholding twenty-one e-mails that they believed were protected by attorney-client privilege.

¶8 On June 10, 2004, and August 2, 2004, the court issued an order and a supplemental order requiring the Village to supply the court with all documents compiled in response to any document request by McCullough for in-camera review. The court also issued an order dismissing McCullough's tort damages claim because of governmental immunity. Additionally, the court dismissed McCullough's § 42 U.S.C. 1983 claim. Finally, the court modified its January 2004 declaratory judgment and ordered that the ruling be disseminated to interested plumbing contractors.

¶9 On September 9, 2004, the court ruled that the Village had improperly withheld some documents relating to McCullough's January 28, 2004 public records request. The court concluded that the Village had fully complied with McCullough's April 1, 2003 request but failed to fully comply with the subsequent requests. The court found that there were nine e-mails created before McCullough's January 28, 2004 public records request that were responsive to the January 28, 2004 request and should have been given to McCullough. The court also found, among the twenty-one e-mails that were withheld claiming attorney-client privilege, there were three e-mails that were created before the January 28 request that were responsive to that request. The court ruled that, since the Village did not claim any privilege at the time of the January 28, 2004 request, those e-

mails must also be divulged. Finally, among the twenty-one e-mails for which the Village claimed attorney-client privilege, the court found one in which attorney-client privilege did not apply. The court ruled that these thirteen e-mails must be disclosed to McCullough and awarded costs as provided by WIS. STAT. § 19.37(2)(a). Additionally, in a separate order on September 9, 2004, the court decided on a mechanism of dissemination for the January 5, 2004 declaratory judgment.

¶10 On November 15, 2004, the court issued a final judgment dismissing McCullough's claims for damages; awarding McCullough costs in the amount of $5,699.22 on their public records claim; and ordering the Village to disseminate the declaratory judgment.

STANDARD OF REVIEW

¶11 When reviewing a grant of a summary judgment motion, we apply the standards set forth in WIS. STAT. § 802.08 in the same way the circuit court applies them. ***Voss v. Middleton***, 162 Wis. 2d 737, 748, 470 N.W.2d 625 (1991). We will affirm if the record shows that there is no genuine issue as to any material fact and that a party is entitled to a judgment as a matter of law. WIS. STAT. § 802.08.

ANALYSIS

¶12 McCullough raises two issues. First, it argues that its claim for tort damages is not barred by the doctrine of governmental immunity. Second, it asserts that the court should not have dismissed its petition for a writ of mandamus, which asked that the court require the Village to follow the uniform plumbing code. The Village cross-appeals the court's determination that the

Village did not fully comply with McCullough's January 28, 2004 and March 4, 2004 public record requests.

I. Governmental Immunity

¶13 McCullough asserts that the Village was exercising a "ministerial duty," an exception to the doctrine of governmental immunity. That duty was to allow McCullough to use HDPE pipe.

¶14 We consider the application of governmental immunity doctrine *de novo*. ***Kimps v. Hill***, 200 Wis. 2d 1, 8, 546 N.W.2d 151 (1996). Governmental immunity for municipal officers is based on WIS. STAT. § 893.80(4):

> No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents, or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

¶15 "Immunity for public officers and employees is grounded in common law and is based largely on public policy considerations that spring from an interest in protecting the public purse and a preference for political rather than judicial redress for actions." ***Meyers v. Schultz***, 2004 WI App 234, ¶11, 277 Wis. 2d 845, 690 N.W.2d 873 (citations omitted). The defense of governmental immunity for public officers and employees assumes negligence and focuses on whether the action or inaction upon which liability is premised is entitled to immunity. ***Lodl v. Progressive Northern Ins. Co.***, 2002 WI 71, ¶17, 253 Wis. 2d 323, 646 N.W.2d 314.

¶16 Thus, we must consider whether the Village's action is entitled to immunity as an exercise of legislative, quasi-legislative, judicial, or quasi-judicial functions. ***Scott v. Savers Property and Casualty Insurance Co.***, 2003 WI 60, ¶15, 262 Wis. 2d 127, 663 N.W.2d 715. The supreme court has defined quasi-legislative or quasi-judicial actions simply as activities that involve the exercise of discretion. ***Scott***, 262 Wis. 2d 127, ¶16. There is an exception to the rule of governmental immunity when the public actor is exercising a ministerial duty. ***Id.*** A duty is regarded as ministerial when it has been "positively imposed by law, and its performance required at a time and in a manner, or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion." ***Lodl***, 253 Wis. 2d 323, ¶26 (citations omitted).

¶17 We analyze this case as the court did in ***Scott***. In ***Scott***, a high school guidance counselor erroneously advised a student that a broadcast communications course would be recognized by the National Collegiate Athletic Association (NCAA) as satisfying a core English requirement. ***Scott***, 262 Wis. 2d 127, ¶9-11. The English requirement was a prerequisite to receiving an athletic scholarship through the NCAA. ***Id.*** The guidance counselor had documents from the NCAA stating that broadcast communications was not an approved course and would not satisfy the English requirement. ***Id.*** Relying on the guidance counselor's advice, the student took the broadcast communications course and was denied his NCAA scholarship because he failed to meet the English requirement. ***Id.***

¶18 The ***Scott*** court concluded that the guidance counselor was not engaged in a "ministerial duty" and thus was protected by governmental immunity. The court said:

> [T]he provision of guidance services is inherently discretionary because the statute and regulation do not impose, prescribe, and define the time, mode, and occasion for its performance. Neither the statute nor the regulation creates a duty that is "absolute, certain and imperative" with respect to counseling or providing information about NCAA requirements.

Scott, 262 Wis. 2d 127, ¶28. The court concluded that the unambiguous NCAA document went to the question of negligence, not to whether the duties of a guidance counselor are ministerial. ***Id.***, ¶29. It said: "As a result of the ***Lister/Lodl*** definition of "ministerial," many governmental actions, even those done under a legal obligation, qualify as discretionary because they implicate some discretion." ***Id.***, ¶28.

¶19 We conclude that, in accord with ***Scott***, the Village was engaged in a discretionary act. The Village is responsible for all building and plumbing permits and must apply a complex group of state statutes, administrative rules, and village ordinances to each permit application. While the Village might have erred by requiring McCullough to use ductile iron piping, as the guidance counselor erred in ***Scott***, this goes to negligence, not immunity. We affirm the circuit court's conclusion that the Village is immune from tort damages under WIS. STAT. § 893.80(4).

II. Writ of Mandamus

¶20 McCullough also argues that the circuit court erred by dismissing its petition for a writ of mandamus requiring the Village to accept any piping that complies with Wisconsin's uniform plumbing code. McCullough argues that the circuit court did not grant its petition because the court concluded that McCullough could obtain tort damages. Since the court subsequently ruled that

the Village was entitled to governmental immunity, McCullough argues that its petition for a writ of mandamus must be granted as its only recourse.

¶21 Mandamus is an extraordinary writ issued in the discretion of the court to compel compliance with a plain legal duty. ***State ex rel. Althouse v. City of Madison***, 79 Wis. 2d 97, 105-106, 255 N.W.2d 449 (1977). Because it is discretionary, the court's decision will be affirmed unless the court erroneously exercised its discretion. ***Law Enforcement Standards Bd. v. Village of Lyndon Station***, 101 Wis. 2d 472, 493, 305 N.W.2d 89 (1981). However, it is an erroneous exercise of discretion to refuse to issue the writ when the following prerequisites are present: (1) a clear legal right; (2) a positive and plain duty; (3) substantial damages; and (4) no other adequate remedy at law. ***Id.*** at 494.

¶22 It is a well-established rule that "mandamus will not lie to compel performance of an act by a public officer unless the act be one that is actually due from the officer at the time of the application." ***State ex rel. Racine County v. Schmidt***, 7 Wis. 2d 528, 534, 97 N.W.2d 493 (1959). McCullough is not asking to be allowed to install HDPE pipe to the building at Triangle Street because its work there is finished. Rather, McCullough, after installing the pipe, is seeking to recoup its past loss through the mandamus damages provision, WIS. STAT. § 783.04.[2] A writ of mandamus may not be so used. The record contains no indication that, at the time it filed its mandamus action, McCullough had any other permit requests pending, such that it was then incurring losses, or would incur a loss as a result of the Village's improper action on its requests. The declaratory judgment issued by the circuit court adequately addresses McCullough's concerns

[2] WISCONSIN STAT. § 783.04 provides that in a mandamus action, "[i]f judgment be for the plaintiff, the plaintiff shall recover damages and costs."

about future contracts, and this constitutes an "adequate remedy at law." We affirm the circuit court's denial of McCullough's petition.

III. Public Records Requests

¶23 The Village cross-appeals from the court's determination that the Village did not fully comply with McCullough's January 28, 2004 and March 4, 2004 public records requests. The Village argues that the twelve e-mails the court found responsive to the January 28, 2004 request were not within the scope of the request and thus were properly withheld. The Village also contends that the one e-mail the court found was not privileged in response to the March 4, 2004 public records request was also not within the scope of the public records request, and thus was properly withheld regardless of whether it was protected by the attorney-client privilege. The Village contends that because it fully complied with the public records requests, the award of fees and costs pursuant to WIS. STAT. § 19.37 should be reversed.

¶24 Wisconsin has a strong presumption of access to open records, which is reflected in both our case law and the Wisconsin Statutes:

> [I]t is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.... The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.

WIS. STAT. § 19.31. When deciding open records issues, we proceed de novo, although we benefit from the circuit court's analysis. ***State ex rel. Bergmann v. Faust***, 226 Wis. 2d 273, 281-282, 595 N.W.2d 75 (Ct. App. 1999).

A The January 28, 2004 Public Records Request

¶25 We begin our analysis with McCullough's January 28, 2004 public records request. The request reads:

> This is a Public Records Request. We request the opportunity to inspect all permits issued for the construction of all water service laterals for potable water issued by the Village of McFarland since January 1, 2001. Please advise the undersigned as soon as those materials are assembled so that we may make arrangements to inspect them directly.
>
> We also wish a copy of any document of the Village of McFarland indicating that ductile iron pipe must be used for water laterals.

The court found that twelve e-mails submitted to the court for in-camera review were covered by this request but were not disclosed. Thus the court concluded that the Village failed to fully comply with the January 28, 2004 public records request.

¶26 We agree with the Village that the e-mails were not within McCullough's public records request. While the request is sufficient under WIS. STAT. § 19.35(1)(h) and thus merits a response, Wisconsin public record law does not require that documents not within the request be produced for inspection. Here, McCullough asked for documents "indicating that ductile iron pipe must be used for water laterals." This is a clear request for specific documents indicating that the Village of McFarland requires ductile iron piping. None of the twelve e-mails in question use the words "ductile iron," let alone indicate that ductile iron pipe must be used for water laterals.

¶27 McCullough contends that, even though the e-mails do not mention ductile iron, they do "discuss what governs the materials used in construction of

various water laterals. Those materials, of course, include ductile iron, PVC, or HDPE [piping]." While this is true, McCullough did not request documents that "discuss what governs the materials used in construction of various water laterals," it requested documents "indicating ductile iron pipe must be used." Nearly half of the e-mails in question indicate that the Village must accept other materials besides ductile iron unless it has an ordinance to the contrary.[3]

¶28 Wisconsin law broadly favors disclosure of public records, ***ECO, Inc. v. City of Elkhorn***, 2002 WI App 302, ¶17, 259 Wis. 2d 276, 655 N.W.2d

---

[3] For example, the final message in the Fleming to Covill & Miller, May 19, 2003; Miller to Harter, May 19, 2003, Bloom to Grorud, May 23, 2003; Grorud to Larry Hainstock, May 27, 2003; Hainstock to Miller, May 27, 2003 e-mail chain informs the Village that:

> The State of Wisconsin adopts the 1999 version of the NFPA [National Fire Protection Association] 13 which regulates what type of pipe is allowed. Section 3-4.1 of the NFPA 13-1999 states, "Piping shall be listed for fire protection service and comply with the AWWA standards in Table 3-4.1, where applicable. Steel piping shall not be used unless specifically listed for underground service in private fire service chain applications." IN Table 3-4.1 the second one from the bottom is PVC. The Table indicates Polyvinyl Chloride (PVC) Pressure Pipe, 4in. Trough 12 in., for Water Distribution may be used as long as it meets the AWWA C900 Standard. As for a municipality not allowing (PVC) pipe in this application, a municipality may adopt something more restrictive than the State regulation as long as the more restrictive regulation is not part of a uniform code. Now to explain that, The Wi. Plumbing Code is a Uniform code (minimum, maximum) so you can't be more or less restrictive. The Sprinkler code is part of the building code which is not a uniform code, so you may by ordinance be more restrictive. The one thing that may be a problem is the sprinkler system you are more restrictive on must be fire protection only it can not be a dual system, domestic water and fire protection.
>
> If it is a dual system than the plumbing code would allow you to use (PVC) regardless of your ordinance, which you can not be more restrictive in because it would be part of the uniform plumbing code. I hope that helps.

510, but a party cannot request one thing and expect to receive another. The twelve e-mails did not satisfy the description of documents in McCullough's January 28, 2004 public records request and thus were properly withheld as irrelevant to that request. Accordingly, we reverse the order for costs and fees awarded pursuant to WIS. STAT. § 19.37(2)(a) relating to the January 28, 2004 request for public records.

B. The March 4, 2004 Public Records Request

¶29 The Village argues that the one e-mail the circuit court found partially non-privileged in response to the March 4, 2004 public records request was also irrelevant to McCullough's March 4, 2004 public records request, and thus the Village should not be forced to disclose the non-privileged e-mail.

¶30 McCullough asserts that the Village thought that the e-mail was relevant because it responded to the March 4, 2004 request by mentioning the e-mail. McCullough claims the Village should be judicially estopped from asserting that the March 4, 2004 e-mail was irrelevant.

¶31 We do not reach the issue of judicial estoppel because public records procedure under WIS. STAT. § 19.35 does not allow the Village to now assert that the document was irrelevant when its reason for withholding the document was privilege. Under § 19.35, once a custodian decides to withhold a document, the custodian must state specific policy reasons for the refusal to disclose the document. ***Osborne v. Board of Regents of the Univ. of Wis. Sys.***, 2002 WI 83, ¶16, 254 Wis. 2d 266, 647 N.W.2d 158; ***Newspapers, Inc. v. Breier***, 89 Wis. 2d 417, 427, 279 N.W.2d 179 (1979). Thereafter, a court will not consider reasons for withholding the document that were not asserted by the custodian. ***Newspapers***, 89 Wis. 2d at 427. The Village withheld the document asserting

attorney-client privilege and did not state any other reason for withholding the document. We will not hypothesize another reason for withholding the document. ***Id***. Thus, we affirm the circuit court's decision.

¶32 The circuit court's orders are affirmed in part, reversed in part, and the cause is remanded for proceedings consistent with this decision.

By the Court.—Orders affirmed in part; reversed in part and cause remanded.

Not recommended for publication in the official reports.