COURT OF APPEALS
DECISION
DATED AND FILED

April 10, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP1593 **Cir. Ct. No. 2015CV44**

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

ALAN W. PINTER,

PLAINTIFF-APPELLANT,

V.

VILLAGE OF STETSONVILLE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Taylor County: ANN KNOX-BAUER, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 STARK, P.J. Alan Pinter sued the Village of Stetsonville, alleging the Village's negligence caused wastewater to back up into the basement of his home on September 10, 2014. The circuit court granted the Village summary judgment, concluding it was immune from suit under WIS. STAT. § 893.80(4)

(2015-16).[1] Pinter argues the circuit court erred because the "ministerial duty" and "known and compelling danger" exceptions to governmental immunity apply. We conclude, based upon the undisputed facts, that neither of these exceptions is applicable.

¶2 Pinter also argues the Village is not entitled to immunity because its actions constituted a "failure to abate a nuisance." We agree that, to the extent Pinter claims the Village failed to abate a nuisance by failing to properly repair or maintain its wastewater disposal system, the Village is not entitled to immunity. Nonetheless, we conclude the circuit court properly granted the Village summary judgment because Pinter failed to raise a genuine issue of material fact as to whether the allegedly negligent maintenance caused the backup in question. We therefore affirm the circuit court's grant of summary judgment to the Village.[2]

BACKGROUND

¶3 The Village, through one of its agencies, owns and operates a wastewater disposal system. That system is designed to collect wastewater from houses in the Village. The system, which is gravity fed, contains two lift stations—the north lift station and the main lift station. David Duellman, a former Village employee, testified at his deposition that a lift station "consists of a pit." Duellman explained that, when wastewater enters a lift station, it is "pumped up"

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] Pinter also argues he was entitled to partial summary judgment as to the Village's negligence. Because we conclude the circuit court properly granted summary judgment in favor of the Village, we need not address this additional argument. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (court of appeals need not address all issues raised by the parties if one is dispositive).

and then continues to flow through the gravity-fed system. Eventually, the wastewater reaches the Village's wastewater treatment facility. Once there, it is treated using a recirculating sand filter system in an aerated pond-lagoon, before being released into the west branch of the Eau Pleine River.

¶4 The Village has a separate storm sewer system for the collection of rainwater. The wastewater disposal system is designed to be a closed system and is not intended to take on rainwater. However, Duellman testified the Village has had problems with rainwater infiltrating the wastewater disposal system due to cracks in the sewer mains, and also because some older homes in the area have drain tile or sump pumps that drain into that system. Duellman testified that, if too much water enters the wastewater disposal system, it can overflow, causing wastewater to back up into residential homes. The Village's president, Gregory Brunner, similarly testified at his deposition that the Village has had a long-standing problem with increased water levels in the wastewater disposal system during periods of heavy rain. Brunner testified, however, that he did not know what was causing rainwater to infiltrate the system.

¶5 Duellman testified the Village's main lift station is equipped with an alarm that alerts Village employees of high water levels. If the water in the main lift station continues to rise, employees can use a portable pump to "bypass" the wastewater disposal system by pumping wastewater from the main lift station directly into a ditch leading to the Eau Pleine River. Duellman explained that the main lift station has a series of twelve "rungs" that can be used if a person needs to climb down inside it. He testified his former supervisor told him to use the rungs as a "guide" for determining when to bypass the wastewater disposal system. Duellman testified, "He basically told me … well, if you see this many rungs going down, you're getting close where you might have to start bypassing."

¶6 More specifically, Duellman testified Village employees would set up the pump when the water reached the fourth rung from the top of the main lift station. If they then observed the water level beginning to recede, they would not bypass the wastewater disposal system. However, if they instead saw that the water was continuing to rise, they would begin pumping. Duellman testified he had shared this information with his coworkers, and he believed the Village board was aware of it. However, he conceded this "rung scenario" was not memorialized in any "operator's manual" in the Village's possession. He instead characterized it as "more or less a rule of thumb." Brunner, in turn, testified the "protocol" as of September 10, 2014, was to ready the pump when the water reached the fourth rung of the main lift station and to start pumping once the pump was in place.

¶7 Chad Smith, another Village employee, was asked at his deposition what the "protocol" was when the alarm in the main lift station indicated a high water level. Smith responded, "We would monitor the rungs …. And once it gets to the fourth rung, we would do a bypass." Smith subsequently agreed that, as of September 10, 2014, it was the Village's "policy" to ready the pump when the water in the main lift station reached the fourth rung and to begin pumping if the water rose above that level. However, he conceded that "policy" "wasn't in any of the paperwork. It was just by what the previous operator taught [Duellman] and what [Duellman] taught me." Smith also explained at his deposition that the Department of Natural Resources (DNR) "doesn't want [the Village] to bypass"—i.e., pump wastewater from a lift station into a ditch—because doing so is "a hazard." He testified an alternative to bypassing is "to have a hauler come in and start sucking out the lift stations" using pump trucks, after which the wastewater is transported by truck to the wastewater treatment facility.

¶8 Pinter's home, which is located relatively close to the main lift station, has experienced multiple wastewater backups during the past two decades. Jack Poirier, the home's previous owner, averred that wastewater backed up into the home's basement in the "early 2000s." According to Poirier's affidavit, the Village accepted fault for that backup and "paid [Poirier] for damages to his property." Poirier averred the Village "reassured" him "that new procedures would be put in place to prevent this from happening again." Specifically, Village employees would "physically monitor the water levels in the lift stations," and if the water rose too high, they would "pump out the water."

¶9 Pinter testified during his deposition that, after he purchased his home from Poirier, wastewater backed up into the home's basement on two occasions prior to September 10, 2014. Pinter testified he reported both of those incidents to Duellman, and both times Duellman stated he would "take care of it" and it would "never happen again." However, it is undisputed that wastewater again backed up into the basement of Pinter's home on September 10, 2014.

¶10 According to Smith's notes about the events of that day, Smith received a "high level alarm" for the north lift station at 7:46 a.m. He immediately called Duellman and told him to "watch" the north lift station, and he then called Black River Transport, a septic hauling company, "to put them on standby." At 7:50 a.m., Smith received a "high level alarm" for the main lift station. He then directed Black River Transport to begin pumping wastewater from the north lift station and delivering it to the treatment facility using one of its trucks. At 8:02 a.m., Smith "took control of the north lift station" and sent Duellman "to control the main lift station." At 8:28 a.m., Black River Transport began pumping the north lift station.

¶11 Sometime between 8:20 and 8:40 a.m., Pinter "ran over" to the main lift station and told Duellman the floor drain in his basement was "gargling" and Duellman "need[ed] to by-pass." According to Smith's notes, Duellman responded that he "was waiting for [Black River Transport] so he didn't have to file [sic] out DNR paper work." Pinter similarly testified during his deposition that he went to the main lift station on the morning of September 10, 2014, after his wife heard the pipes in their basement "gurgling." Pinter informed Duellman of the gurgling and asked whether the "pit" needed to be pumped, but Duellman responded, "No. I am watching it." Pinter testified he offered to help Duellman set up the portable pump, but Duellman declined his offer, stating, "We don't need it. I got a truck coming in to empty it out." When Pinter asked Duellman why he was not pumping the main lift station using the portable pump, Duellman responded, "I don't want to pump it out because then I have to fill out the papers for the DNR, and I don't want to."[3]

¶12 Pinter testified he then went to work, but ten to fifteen minutes later his wife called and told him their basement was flooding. Pinter then returned to the main lift station and told Duellman about the backup. Smith's notes indicate that Duellman called Smith at 8:40 a.m. and asked him "to have [Black River Transport] come to the main lift station to pump." Duellman told Smith the water had reached the second rung from the top of the main lift station, and Duellman had "never seen it this high." The truck from Black River Transport then left the

[3] During his deposition, Duellman testified DNR regulations "say that if you have to bypass I have to notify the DNR within 24 hours of … what occurred, what we did and how we prevented it from being a backup …. And then five days later we have to have a written report sent up to our DNR engineer."

north lift station and went to the wastewater treatment facility to empty its load. It began pumping the main lift station at 8:55 a.m.

¶13 The truck was full by 9:35 a.m., so it stopped pumping the main lift station and left to empty its contents at the wastewater treatment facility. However, according to Smith's notes, "Before [the truck] even made up [sic] to the treatment plant to dump[,] [the main lift station] was taking on so much water so fast and Al Pinter was yelling from [his] house the drain is gargling[,] the water is coming." At that point, Smith "decided [he] needed to by-pass." He set up the portable pump and began pumping the main lift station at 9:45 a.m. The water in Pinter's basement then receded, but it left behind a black and gray residue containing toilet paper and feces.

¶14 Pinter filed the instant lawsuit against the Village on May 8, 2015, asserting a single cause of action for negligence. He later filed an amended complaint, which added a second cause of action for private nuisance. The Village moved for summary judgment, asserting it was entitled to governmental immunity under WIS. STAT. § 893.80(4). In response, Pinter argued governmental immunity did not apply because: (1) the Village had a ministerial duty to bypass the wastewater disposal system when the water reached the fourth rung from the top of the main lift station; (2) the risk of wastewater backing up into Pinter's basement constituted a known and compelling danger; and (3) the Village had created a private nuisance "due to the poor maintenance of [its] sewer lines" and had failed to abate that nuisance.

¶15 The circuit court granted the Village's summary judgment motion. First, the court concluded the Village did not have a ministerial duty to bypass the wastewater disposal system when the water in the main lift station reached a

particular level. The court observed there was no "regulation" imposing such a duty. The court further concluded the Village's "rule of thumb" that it would bypass when the water reached the fourth rung was merely "an instruction that was handed down by the maintenance supervisor" and was not mandated by any "governing authority." The court explained:

> Maintenance workers confronted with the rising level of water had to make a determination whether to [bypass] the system (which was disfavored by the DNR), take the chance that the water would recede on its own, or risk back up into the plaintiff's home. There is no case law to support the plaintiff's assertion that the Village's "rule of thumb" created a ministerial duty such that there was no room for exercise of discretion by the employees.

¶16 The circuit court next rejected Pinter's argument that the known and compelling danger exception to governmental immunity applied, stating there was "no precedent for this court to say as a matter of law that there is an exception for a known and compelling danger under these facts." Finally, the court rejected Pinter's nuisance argument, stating there was no evidence to support Pinter's claim that the Village "failed to maintain the sewer system and thus caused the sewage back up into [Pinter's] home." The court reasoned that "statements made by Village employees" regarding the "cause or suspected cause of the problem" were merely their "personal assumptions" and were therefore insufficient to "link the Village's alleged lack of maintenance to the back up of sewage." Pinter now appeals, arguing the circuit court erred by granting the Village summary judgment.

DISCUSSION

¶17 We independently review a grant of summary judgment, using the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate where no

genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law. WIS. STAT. § 802.08(2). Here, the circuit court granted the Village summary judgment based on its conclusion that the Village was immune from suit under WIS. STAT. § 893.80(4). The application of § 893.80(4) and its exceptions to a set of facts presents a question of law that we review independently. ***Heuser ex rel. Jacobs v. Community Ins. Corp.***, 2009 WI App 151, ¶21, 321 Wis. 2d 729, 774 N.W.2d 653.

¶18 WISCONSIN STAT. § 893.80(4) states that governmental subdivisions and their employees are immune from liability for acts that are "done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions." Stated differently, the statute immunizes governmental subdivisions and their employees from liability for "any act that involves the exercise of discretion and judgment." ***Lodl v. Progressive N. Ins. Co.***, 2002 WI 71, ¶21, 253 Wis. 2d 323, 646 N.W.2d 314. There are, however, various exceptions to governmental immunity. *See* ***id.***, ¶24. Pinter argues three such exceptions apply in the instant case, and the Village is therefore not entitled to immunity.

I. The ministerial duty exception

¶19 The ministerial duty exception to governmental immunity "is not so much an exception as a recognition that immunity law distinguishes between discretionary and ministerial acts, immunizing the performance of the former but not the latter." ***Id.***, ¶25. A duty is ministerial, as opposed to discretionary, if it 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." ***Lister v. Board of Regents of Univ. Wis. Sys.***, 72 Wis. 2d 282, 301,

240 N.W.2d 610 (1976). In other words, for a duty to be ministerial, the governmental defendant "must be not only bound to act, but also bound by law to act in a very particular way." ***Yao v. Chapman***, 2005 WI App 200, ¶29, 287 Wis. 2d 445, 705 N.W.2d 272.

¶20 The first step in the ministerial duty analysis is to identify a source of law or policy that imposes the alleged duty. ***Pries v. McMillon***, 2010 WI 63, ¶31, 326 Wis. 2d 37, 784 N.W.2d 648. Ministerial duties may be imposed by a wide variety of materials, although the spectrum is not "limitless." ***Id.*** Wisconsin courts have previously held that certain statutes and administrative regulations impose ministerial duties. *See, e.g.*, ***Legue v. City of Racine***, 2014 WI 92, ¶¶121-25, 357 Wis. 2d 250, 849 N.W.2d 837 (concluding a statute governing rules of the road applicable to authorized emergency vehicles imposed a ministerial duty); ***Umansky v. ABC Ins. Co.***, 2009 WI 82, ¶¶13-18, 319 Wis. 2d 622, 769 N.W.2d 1 (concluding a federal safety regulation imposed a ministerial duty). In some circumstances, courts have also found the existence of ministerial duties based on written policies or procedures adopted by governmental bodies. *See, e.g.*, ***Pries***, 326 Wis. 2d 37, ¶¶9, 31-33 (holding a set of written procedures for dismantling horse stalls at the Wisconsin State Fair Park imposed a ministerial duty); ***Bicknese v. Sutula***, 2003 WI 31, ¶¶22-30, 260 Wis. 2d 713, 660 N.W.2d 289 (finding the existence of a ministerial duty based on a university policy manual setting forth directives for calculating an employee's tenure clock).

¶21 Here, Pinter argues the Village had a clear policy that employees "must bring out the portable pump and start pumping when the sewage reached the fourth rung of the main lift station tank." Pinter argues this policy gave rise to a ministerial duty to use the portable pump at a specified time, leaving no room for the exercise of judgment or discretion. Pinter further argues the Village did not

comply with its own clear policy because the evidence shows that wastewater had reached the second highest rung of the main lift station by 8:40 a.m. on September 10, 2014, but Village employees did not begin pumping with the portable pump until 9:45 a.m., at which point wastewater had already backed up into Pinter's basement.

¶22 We reject Pinter's argument that the Village had a clear "policy" giving rise to a ministerial duty to use the portable pump at a specific time. The summary judgment record does not reveal the existence of a formal, written policy requiring Village employees to begin using the portable pump when sewage reached the fourth rung from the top of the main lift station. Instead, Duellman testified that so-called policy was merely an oral directive, or "rule of thumb," passed down to him by a prior Village employee. While Smith testified during his deposition that it was the Village's "policy" to ready the pump when the water in the main lift station reached the fourth rung and then start pumping if the water rose above that level, he also indicated that policy "wasn't in any of the paperwork. It was just by what the previous operator taught [Duellman] and what [Duellman] taught me." Although Duellman testified he believed the Village board was aware of this "policy," there is no evidence indicating the board ever formally adopted or approved it.

¶23 Pinter does not cite any prior case in which a Wisconsin court has found the existence of a ministerial duty based on an unwritten, oral policy that was not adopted or approved by any governmental entity. We conclude recognizing a ministerial duty under such circumstances would be fundamentally inconsistent with the ministerial duty inquiry, which looks for "absolute, certain and imperative" duties that are so specific that "nothing remains for judgment or discretion." *See* ***Lister***, 72 Wis. 2d at 301. In the absence of some writing or other

documentation memorializing a so-called "policy," we would be forced to rely on witness testimony regarding the policy's existence and scope. However, witnesses' memories may fail or change over time, leaving the precise contours of a purported policy in doubt. Moreover, without a written directive, there is no guarantee that individual employees of a governmental entity received the same instructions. These considerations convince us that an oral "rule of thumb," like the one at issue in this case, is insufficient to give rise to a ministerial duty.[4]

¶24 Furthermore, even if we concluded the unwritten "rung" procedure in this case was the type of directive that could constitute a "policy" for purposes of the ministerial duty exception, we would nevertheless conclude it was not specific and absolute enough to remove Village employees' discretion in responding to high water levels. Duellman testified his supervisor had told him to use the rungs as a "guide" for determining when to bypass the wastewater disposal

[4] Pinter argues it is "not uncommon for courts to recognize municipalities' oral policies in deciding various issues and in finding municipalities liable in various contexts upon oral policies." However, none of the cases he cites involved the ministerial duty exception to governmental immunity. *See* ***James v. Harris Cty.***, 577 F.3d 612, 614-15, 618 (5th Cir. 2009) (assuming without deciding, in a case alleging the use of excessive force by a police officer, that the police department had an unwritten policy of under-investigating officer-involved shootings); ***Corder v. Lewis Palmer Sch. Dist. No. 38***, 566 F.3d 1219, 1222-23, 1225-34 (10th Cir. 2009) (rejecting a student's claim that her school district's unwritten policy of reviewing valedictory speeches prior to graduation ceremonies was unconstitutional); ***Faustin v. City & Cty. of Denver, Colo.***, 423 F.3d 1192, 1194 (10th Cir. 2005) (concluding an unwritten policy banning signs and banners on overpasses was constitutional); ***Strauss v. City of Chi.***, 760 F.2d 765, 766-67 (7th Cir. 1985) (stating municipalities can be held liable under 42 U.S.C. § 1983 for "constitutional violations caused by their official policies, including unwritten customs"); ***State v. Clark***, 2003 WI App 121, ¶¶10-12, 265 Wis. 2d 557, 666 N.W.2d 112 (considering a police department's unwritten policy in determining whether the seizure of a vehicle was reasonable, in the context of a motion to suppress evidence).

The issue in this case is whether the Village's alleged "policy" was definite and absolute enough to create a ministerial duty requiring Village employees to respond to high water levels in a specific way. The cases cited above—although addressing unwritten policies in other scenarios—are not relevant to that issue.

system, and "if you see this many rungs going down, you're *getting close* where you *might* have to start bypassing." (Emphasis added.) Duellman also testified that, after setting up the pump when the water reached the fourth rung of the main lift station, Village employees would watch the water level and decide whether to pump based on whether it appeared to be rising or receding. Smith similarly testified that, after setting up the pump, workers would watch the water level to decide whether to begin pumping. This testimony indicates that the "policy" testified to by Duellman and Smith did not fully remove Village employees' discretion in determining whether—and when—to pump.

¶25 In addition, the evidence demonstrates that, when faced with high water levels, Village employees were not limited to either: (1) doing nothing; or (2) using the portable pump to transfer wastewater from the main lift station into a ditch. Instead, they also had the option of using pump trucks to remove wastewater from the lift station and transport it to the wastewater treatment facility. The record indicates this was the DNR's preferred method of responding to high water levels. Ultimately, we agree with the Village's assessment that

> [t]here is no denying that it would have been better for the waste water to have gone into the river than [Pinter's] basement, but there is also no denying that it would have been better than both of those scenarios to have the pump trucks solve the problem. That was the goal the Village employees were instructed by the DNR to try to achieve, and it was within their discretion to have strived for it.

Under these circumstances, we conclude the Village's unwritten "rule of thumb" regarding use of the portable pump did not eliminate workers' discretion to attempt to control the water level using pump trucks, if they believed doing so would adequately address the problem. The ministerial duty exception is therefore inapplicable.

II. The known and compelling danger exception

¶26 Pinter next argues the Village is not entitled to governmental immunity because the known and compelling danger exception applies. That exception abrogates immunity in situations where "there exists a danger that is known and compelling enough to give rise to a ministerial duty on the part of a municipality or its officers." ***Lodl***, 253 Wis. 2d 323, ¶4. The exception does not, however, apply in all dangerous situations. ***Id.***, ¶40. Instead, it is reserved for situations where the danger is "compelling enough that a self-evident, particularized, and non-discretionary municipal action is required." ***Id.***

¶27 The known and compelling danger exception was first recognized in ***Cords v. Anderson***, 80 Wis. 2d 525, 259 N.W.2d 672 (1977). There, a hiking trail on state property was located inches away from a ninety-foot-deep gorge. ***Id.*** at 530, 538. Multiple individuals were injured when they fell into the gorge while hiking at dusk. ***Id.*** at 534-36. Our supreme court concluded the park manager had a ministerial duty to either place signs warning the public of the danger posed by the gorge or to advise his supervisors of the hazardous condition so that they could do so. ***Id.*** at 541-42. The court explained:

> There comes a time when "the buck stops." [The park manager] knew the terrain at the glen was dangerous particularly at night; he was in a position as park manager to do something about it; he failed to do anything about it. He is liable for the breach of this duty.

Id. at 541.

¶28 Since ***Cords***, Wisconsin courts have developed a three-step test to determine whether the known and compelling danger exception applies in a given case. *See* ***Heuser***, 321 Wis. 2d 729, ¶¶27-28. First, we ask whether something

happened to create a compelling danger. ***Id.***, ¶28. Second, we consider whether a government actor "[found] out about the danger, making it a known and compelling danger." ***Id.*** Third, we ask whether the government actor addressed the danger by taking one or more precautionary measures or instead "[did] nothing and let[] the danger continue." ***Id.***

¶29 We agree with the Village that the known and compelling danger exception does not apply in the instant case.[5] As noted above, under the third step of the analysis, we must consider whether the Village took one or more precautionary measures to respond to the danger, or instead did nothing and let the danger continue. *See* ***id.*** "[S]o long as *a* precautionary measure is taken in response to an open and obvious danger, the law is that the government remains immune from suit." ***Id.***, ¶1.

[5] The parties disagree about the first step in the known and compelling danger analysis—namely, whether the danger posed by sewage backup into a residential home is "compelling." The Village asserts that, while "nauseating," a sewage backup is "far more likely to result in property damage than personal injury." The Village contends every Wisconsin case applying the known and compelling danger exception has involved a situation posing a "tremendous risk of bodily harm."

Because we conclude the known and compelling danger exception is inapplicable in this case based on the third step of the analysis, we need not decide whether the danger at issue here is "compelling." However, we note that it appears obvious—and within the realm of lay knowledge—that the release of untreated sewage into a residential dwelling poses a risk to human health. Duellman testified during his deposition that untreated wastewater can be hazardous, in the sense that it can give rise to "[h]uman diseases." He testified treating wastewater protects both humans and the environment, and he conceded the release of wastewater into Pinter's basement would "be a concern to human health." Smith similarly testified the bacteria in untreated wastewater can pose health concerns. This testimony, along with common knowledge, appears sufficient to support a reasonable inference that the backup of wastewater into a residential home poses at least a risk of bodily harm.

¶30 In ***Heuser***, we concluded the known and compelling danger exception applied in circumstances where the plaintiff cut himself with a scalpel while performing a flower dissection activity during an eighth-grade science class. *See* ***id.***, ¶1. The record in ***Heuser*** indicated that two students had cut themselves earlier in the day while performing the same activity. ***Id.***, ¶4. Following those incidents, the plaintiff's teacher filled out accident reports indicating that future accidents could be prevented by limiting scalpel use or by having students use scissors instead. ***Id.***, ¶5. However, she did not follow those recommendations in later classes, including the one in which the plaintiff was injured, nor did she take any other precautionary measures. ***Id.***, ¶6. We concluded the teacher's failure to do *anything* in response to the known and compelling danger posed by the students' use of scalpels abrogated the school district's immunity. ***Id.***, ¶34.

¶31 Here, in contrast, the Village clearly took precautionary measures after learning of high water levels in its wastewater disposal system. Smith was notified of a high water level at the north lift station at 7:46 a.m. He immediately sent Duellman to monitor that station and called Black River Transport to "put them on standby." After receiving a high level alarm for the main lift station, Smith directed Black River Transport to begin pumping the north lift station, sent Duellman to the main lift station, and "took control of" the north lift station. Duellman subsequently directed Black River Transport to begin pumping the main lift station instead. When Black River Transport's truck left the main lift station to empty its contents at the wastewater treatment facility, the water continued to rise, at which point Smith decided to set up the portable pump.

¶32 On this record, it cannot be said that the Village took no action to prevent wastewater from backing up into Pinter's home. The fact that the Village's actions were ultimately inadequate to prevent the backup might be a

basis to conclude the Village was negligent.[6] It is not, however, a basis to conclude the known and compelling danger exception abrogates the Village's governmental immunity. Again, as long as "*a* precautionary measure is taken in response to an open and obvious danger, the law is that the government remains immune from suit." ***Id.***, ¶1. Here, the Village clearly took precautionary measures to prevent the backup, and the known and compelling danger exception is therefore inapplicable.

III. Failure to abate a private nuisance

¶33 Finally, Pinter argues the Village is not entitled to governmental immunity because it created, and subsequently failed to abate, a private nuisance. "A private nuisance is a condition that harms or interferes with a private interest." ***Bostco LLC v. Milwaukee Metro. Sewerage Dist.***, 2013 WI 78, ¶30, 350 Wis. 2d 554, 835 N.W.2d 160.

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either
>
> (a) [I]ntentional and unreasonable, or
>
> (b) [U]nintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

Id., ¶31 (quoting RESTATEMENT (SECOND) OF TORTS, § 822) (brackets in ***Bostco***).

[6] *See* ***Lodl v. Progressive N. Ins. Co.***, 2002 WI 71, ¶17, 253 Wis. 2d 323, 646 N.W.2d 314 (explaining the immunity defense "assumes negligence" and instead focuses on "whether the municipal action (or inaction) upon which liability is premised is entitled to immunity under the statute, and if so, whether one of the judicially-created exceptions to immunity applies").

¶34 Whether a municipality is entitled to governmental immunity from a lawsuit alleging that its actions created a nuisance depends on "the nature of the tortious acts giving rise to the nuisance." ***Milwaukee Metro. Sewerage Dist. v. City of Milwaukee***, 2005 WI 8, ¶90, 277 Wis. 2d 635, 691 N.W.2d 658 (hereinafter, ***MMSD***). A municipality is immune from suit if the nuisance "is predicated on negligent acts that are discretionary in nature." ***Id.*** Conversely, a municipality is not entitled to immunity when the negligent conduct underlying the nuisance claim is "comprised of acts performed pursuant to a ministerial duty." ***Id.***

¶35 In ***MMSD***, our supreme court held that decisions related to the "adoption, design, and implementation of a public works system" are discretionary, and a municipality is therefore immune from liability for claims based on those decisions. ***Id.***, ¶91. In contrast, the court held the City of Milwaukee could be "potentially liable" for its failure to repair a leaking water main. ***Id.***, ¶61. However, the court concluded there was a material issue of fact as to whether the City had notice of the leaking water main. ***Id.***, ¶91. As a result, the court could not determine, as a matter of law, whether the City "was under a ministerial duty to repair [the] water main" before it burst. ***Id.***

¶36 When later discussing ***MMSD*** in ***Bostco***, the court further explained,

> [I]f the City had notice that its water main was leaking before it broke, it had a duty to abate the nuisance by fixing the pipe. The *duty to fix the pipe*, if the City knew it was leaking, was "absolute, certain and imperative"—in other words, ministerial—even though a *particular method* of repairing the leak was not "absolute, certain and imperative."

Bostco, 350 Wis. 2d 554, ¶41 (footnotes omitted). The ***Bostco*** court concluded the defendant in that case was not entitled to immunity because the plaintiff's

nuisance claim was "grounded in [the defendant's] negligent maintenance" of a sewerage tunnel. ***Id.***, ¶4. The court explained the defendant's "maintenance of the continuing private nuisance [was] not a legislative, quasi-legislative, judicial or quasi-judicial function." ***Id.***

¶37 Based on ***MMSD*** and ***Bostco***, Pinter argues the Village is not entitled to immunity because "the poor condition" of the Village's wastewater disposal system, "combined with" the Village's failure to bypass the main lift station at the appropriate time on September 10, 2014, "constituted [a] failure to abate a nuisance." We first reject this argument, to the extent it is based on the Village's failure to bypass the main lift station.

¶38 ***MMSD*** and ***Bostco*** hold that a municipality may be liable for its negligent failure to maintain or repair a public works system, when such failure creates a nuisance. *See* ***Bostco***, 350 Wis. 2d 554, ¶4; ***MMSD***, 277 Wis. 2d 635, ¶61; *see also* ***Menick v. City of Menasha***, 200 Wis. 2d 737, 745, 547 N.W.2d 778 (Ct. App. 1996) (stating a municipality has "no discretion as to maintaining [a sewer] system so as not to cause injury to residents"). However, the failure of the Village's employees to bypass the main lift station at some earlier point in time on September 10, 2014, was not a failure to maintain or repair the Village's wastewater disposal system. Rather, we agree with the Village that its employees' actions that day "were taken in an effort to manage a developing emergency situation using tools, the pump trucks and the bypass pump, which are not part of the System." As discussed above, the Village's employees had discretion to decide how to respond to that emergency situation. Accordingly, to the extent Pinter's claims are premised on Village employees' failure to bypass the main lift station, we conclude the Village is entitled to immunity.

¶39 We therefore turn to Pinter's other allegation—i.e., that the Village was aware water from outside sources was infiltrating its wastewater disposal system, but it failed to rectify that problem, thereby creating a private nuisance. We agree with Pinter that this conduct, if true, would constitute a failure to repair a known defect in the wastewater disposal system, and, as such, the Village would not be entitled to governmental immunity under ***MMSD*** and ***Bostco***. Nonetheless, we conclude the circuit court appropriately granted the Village summary judgment because Pinter failed to raise a genuine issue of material fact as to whether the Village's failure to repair the wastewater disposal system was a "legal cause" of the damage to his home.

¶40 Our conclusion in this regard relies in large part on ***Menick***. In that case, Lisa Menick sued the City of Menasha after sewage from the City's sewer system backed up into her basement on two occasions. ***Menick***, 200 Wis. 2d at 741. Her complaint included a claim for private nuisance. ***Id.*** The City moved for summary judgment, ***id.*** at 742, arguing in part that it was entitled to governmental immunity, ***id.*** at 744.

¶41 We concluded the City was not entitled to immunity because its actions "in operating and maintaining the sewer system" were not discretionary. ***Id.*** at 745. However, we nevertheless concluded the City was entitled to summary judgment on Menick's private nuisance claim. We reasoned that, in order to prevail on that claim, Menick would be required to show that the City's conduct was a "legal cause" of the sewage backup in her basement. ***Id.*** at 747. Thus, in order to survive summary judgment, Menick was required to establish a genuine issue of material fact with respect to causation. ***Id.*** at 747-48. We concluded Menick had failed to do so, explaining:

> Expert testimony is required to prove causation if the matter does not fall within the realm of ordinary experience and lay comprehension.
>
> Menick has the burden of proving that the flooding was caused by the negligence of the City. Our review of the record shows that she has failed to provide any expert testimony or to advance any theory of liability supported by specific allegations or negligent actions on the part of the City.

Id. at 748 (citation omitted). We further stated, "While there is no dispute that the City's sewer system was the conduit for sewage to enter Menick's residence, that fact does not satisfy the requirement that the City's actions are the *legal cause* of the backup." ***Id.***

¶42 Here, as in ***Menick***, Pinter has failed to present any expert testimony supporting his theory that the Village's failure to repair or maintain the wastewater disposal system caused water from outside sources to infiltrate the system on September 10, 2014, which in turn caused wastewater to back up into his basement. In order to raise a genuine issue of material fact with respect to causation, Pinter needed to present evidence demonstrating: (1) that water from outside sources in fact infiltrates the wastewater disposal system; (2) when the water infiltrated the system and in what amount; (3) whether that amount of infiltration was unreasonable, given the size of the system; and (4) whether the infiltration contributed to the backup in Pinter's basement. These matters are beyond a lay person's knowledge. Expert testimony was therefore required.

¶43 Pinter argues expert testimony was unnecessary because Duellman and Brunner both testified that the wastewater disposal system has a problem with infiltration of water from outside sources, which can lead to high water levels. However, neither Duellman nor Brunner was qualified as an expert witness in this area. Moreover, there is no evidence in the record that Duellman or Brunner

performed any testing or provided any other basis to determine whether outside water infiltrated the system on September 10, 2014, and, if so, the source of the infiltration or its amount. There is also no evidence as to whether the amount of infiltration on that date was greater than what would otherwise be expected, or was greater than what the wastewater disposal system would be expected to or could handle. We agree with the circuit court that Duellman's and Brunner's statements simply reflected their "personal assumptions as to the cause or suspected cause of the problem" and were therefore insufficient to raise a genuine issue of material fact regarding causation.

¶44 Pinter also argues expert testimony was not required because "[t]he line of causation is uncontroverted and clear." We disagree. Pinter himself has suggested two potential causes for the September 10, 2014 backup: (1) infiltration of outside water into the wastewater disposal system; and (2) Village employees' failure to bypass the main lift station when wastewater reached the fourth rung. We have already concluded the Village is immune from liability for its employees' discretionary decision to attempt to reduce the water level in the main lift station by using pump trucks instead of the portable pump. Thus, for the Village to be held liable, a jury would need to conclude that the infiltration of outside water was a substantial factor in causing the backup. *See* ***Zarnstorff v. Neenah Creek Custom Trucking***, 2010 WI App 147, ¶35 n.6, 330 Wis. 2d 174, 792 N.W.2d 594 (explaining that, in the negligence context, "legal cause" requires a showing that the negligent conduct was "a substantial factor in producing the injuries"). There is insufficient evidence in the record for a jury to reasonably reach that conclusion.

¶45 Determining to what extent the backup was caused by infiltration, as opposed to Village employees' failure to bypass, does not fall within the realm of lay knowledge. Because Pinter has not presented expert testimony on this topic,

no jury could reasonably conclude infiltration was a substantial factor in causing the backup. Moreover, it is undisputed that, following the backup, the Village instituted a formal policy that employees will set up the portable pump when water reaches the sixth rung from the top of the main lift station, and they will begin pumping when water reaches the fourth rung, with "no questions asked." It is further undisputed that, since the Village instituted this policy, wastewater has not backed up into Pinter's home. This evidence strongly suggests that the September 10, 2014 backup was caused by Village employees' discretionary decision to delay bypassing the system, rather than by the infiltration of water from outside sources.

¶46 On this record, Pinter has failed to raise a genuine issue of material fact as to whether infiltration by outside water caused wastewater to back up in his basement on September 10, 2014. As a result, the circuit court properly granted summary judgment in favor of the Village.

By the Court.—Judgment affirmed.

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