COURT OF APPEALS
DECISION
DATED AND FILED

May 11, 2010

David R. Schanker
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. 2009AP1354 **Cir. Ct. No. 2007CV98**

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

SHAWN HEURING AND THOMAS HEURING,

PLAINTIFFS-APPELLANTS,

BLUE CROSS BLUE SHIELD OF MICHIGAN,

INVOLUNTARY-PLAINTIFF,

V.

A-1 EXCAVATING, INC. AND MSA PROFESSIONAL SERVICES, INC.,

DEFENDANTS-RESPONDENTS,

CITY OF HURLEY, WISCONSIN,

DEFENDANT.

APPEAL from an order of the circuit court for Iron County: PATRICK J. MADDEN, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Shawn and Thomas Heuring appeal from an order granting summary judgment to MSA Professional Services, Inc. and A-1 Excavating, Inc., government contractors accused of negligently designing and constructing a street in the City of Hurley. The circuit court, concluding the contractors were "agents" of the City and entitled to government immunity, dismissed the Heurings' personal injury claims. We agree MSA and A-1 were acting as agents of the City and are entitled to immunity. Consequently, we affirm.

BACKGROUND

¶2 Approximately eight years ago, the City hired MSA to review the City's sewer and water systems. MSA recommended the City replace sanitary sewer pipeline beneath Silver Street and prepared cost estimates for the project. The City approved preliminary plans and sought funding from the Wisconsin Department of Transportation, which was independently planning a project that included resurfacing Silver Street. The DOT refused to finance the City's entire proposal, but offered to apply the surface asphalt layer after the City reconstructed the road.

¶3 The City has no engineering staff and does not design its own construction projects. MSA has provided those services for ten years, and was again hired to design the Silver Street project and oversee its construction. Silver Street, which runs through the City's downtown business district, is a high-traffic road often used by trucks. Consequently, MSA's design called for a deep layer of pavement—six and one-half inches of asphalt—applied in three lifts of varying thickness. A general contractor, selected by the City with MSA's recommendation, was to complete the sewer improvements, repair the sidewalk,

and place the first two layers of asphalt. The DOT's contractor would then place the final lift, one and three-quarters inches thick, to complete the paving. Both the City and the DOT reviewed and approved the Silver Street designs.

¶4 MSA solicited bids from contractors in early 2006. The City hired A-1 as general contractor. MSA and A-1 acted under separate contracts with the City and had no contractual relationship with one another. A-1's job was simply to complete the project according to MSA's design. MSA acted as the liaison between A-1 and the City, ensuring the project proceeded as scheduled and in conformity with the approved plans. Any substantial changes during construction required city council approval. Even relatively minor changes that could potentially impact other aspects of the project were approved by the City's Department of Public Works. The DPW was informed of all deviations from the plans, regardless of their significance.

¶5 A-1's contract indicates the City planned to open Silver Street with only the first two layers of asphalt in place. Substantial completion of the Silver Street project, which required roadway restoration "thru binder course of asphalt pavement and open to traffic," was necessary by September 11, 2006. The September 11 date was selected to accommodate the DOT's pavement contractors, who would then apply the final lift of asphalt. Bad weather and an unexpected waterline relocation forced the City and the DOT to revise the substantial completion date. Due to delays in its own schedule, the DOT had not yet laid the final layer of asphalt when the City opened Silver Street to traffic in late

September. As a result, Silver Street opened with exposed curb rising one and three-quarters inches above the paved road.[1]

¶6 The Heurings commenced this action following an accident on September 25, 2006. That afternoon, Shawn Heuring stepped between two vehicles parked on Silver Street and tripped on the exposed curb. The City and contractors asserted governmental immunity pursuant to WIS. STAT. § 893.80(4).[2] The circuit court granted their summary judgment motions and the Heurings now appeal the order as to MSA and A-1.

DISCUSSION

¶7 Whether a contractor is entitled to governmental immunity is a question of law we review de novo. *See* ***Estate of Brown v. Mathy Constr. Co.***, 2008 WI App 114, ¶6, 313 Wis. 2d 497, 756 N.W.2d 417. We also review a grant of summary judgment de novo, applying the same standard as the circuit court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-16, 401 N.W.2d 816 (1987). Summary judgment is appropriate where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2); ***Kersten***, 136 Wis. 2d at 315.

[1] Silver Street was not paved until the following spring. As MSA supervisor Scott Martin testified, asphalt paving is temperature dependent, yet is the final element of road construction. Demand for asphalt contractors is highest in fall, but DOT regulations prohibit paving after a certain date. Scheduling delays forced the DOT's contractor to apply a temporary winter solution because it was unable to complete the final lift before the DOT's deadline. Such problems are common in cold-air environments.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

¶8 WISCONSIN STAT. § 893.80(4) immunizes local governments and their officers, employees, or agents from liability for acts involving the exercise of discretion or judgment. ***Lodl v. Progressive N. Ins. Co.***, 2002 WI 71, ¶¶20-21, 253 Wis. 2d 323, 646 N.W.2d 314. We extended this protection to government contractors in ***Estate of Lyons v. CAN Insurance Companies***, 207 Wis. 2d 446, 453-54, 558 N.W.2d 658 (Ct. App. 1996), concluding that a contractor should not bear liability when "simply acting as an 'agent' of governmental authorities who had retained ultimate responsibility" for an allegedly negligent bridge design. According to ***Estate of Lyons***, an independent government contractor is an "agent" for purposes of § 893.80(4), and therefore entitled to immunity, if: "(1) the governmental authority approved reasonably precise specifications; (2) the contractor's actions conformed to those specifications; and (3) the contractor warned the supervising governmental authority about the possible dangers associated with those specifications that were known to the contractor but not to the governmental officials." ***Id.*** at 457-58. The Heurings argue the undisputed facts do not support immunity. We disagree.

¶9 The first element is satisfied by proof that the government provided the contractor with reasonably precise specifications. ***Id.*** at 457. Here, there is no dispute the government approved MSA's design, but the Heurings contend the project lacks the requisite precision. "A contract is reasonably precise if it reasonably and precisely lists the items required; common sense dictates that items not required by the contract do not obligate the contractor to provide them." ***Estate of Brown***, 313 Wis. 2d 497, ¶13.

¶10 The undisputed evidence shows the City and the DOT approved reasonably precise specifications. A-1's contract required it to place only the first two asphalt layers and specifically noted the DOT "will … place the final lift of

asphalt (1 ¾ inches thick) on the mainline run of Granite Street and Silver Street from Sixth Avenue to the Montreal River." The project was "substantially completed" not when the DOT placed the final asphalt lift, but when A-1 completed the second asphalt layer and the roadway was open to traffic. A design drawing labeled "Silver Street Typical Section" shows the exposed concrete curb rising one and three-quarters inches above two layers of asphalt and notes the "surface course," or final asphalt layer, will be "done by others." There is no evidence MSA and A-1 retained any discretion with respect to the number or thickness of asphalt layers or the height of the curb. All were identified, with precision, in the design documents approved by the City and the DOT.

¶11 Design drawings also indicate the precise traffic control and warning signs required, and their location, during each phase of construction. The drawings depict an aerial view of the construction zone and note the exact spot of each barricade, traffic control drum, light, and sign. Signs indicating stops, detours, road closures, no parking zones, and impending road work are among those required. No required signage warned of the exposed curb or indicated a trip hazard. Any argument that these drawings confer substantial discretion or lack specificity is implausible at best.

¶12 Nonetheless, the Heurings contest this element, though they conceded it before the trial court.[3] They argue A-1's contract vested it with

[3] MSA and A-1 contend the Heurings' concession implicates the forfeiture rule. *See* ***State v. Hayes***, 2004 WI 80, ¶21, 273 Wis. 2d 1, 681 N.W.2d 203 (issues not raised in the circuit court will not be considered for the first time on appeal). We agree with the Heurings, however, that the individual prongs of the immunity test in ***Estate of Lyons v. CAN Insurance Companies***, 207 Wis. 2d 446, 457-58, 558 N.W.2d 658 (Ct. App. 1996), are not "issues" to which the waiver rule applies. Regardless, we are not bound by any concession made in the court below on a question of law. ***State v. Gomaz***, 141 Wis. 2d 302, 307, 414 N.W.2d 626 (1987).

considerable discretion by directing it to "erect and maintain barricades and signs as necessary." We reject this argument because the necessity of barricades and signs was, of course, dictated by the detailed drawings previously described. The Heurings also contend A-1's contract, requiring "any excavations, obstacles, or other hazards" to be fenced in, confers broad discretion that defeats immunity. We also reject this argument. The Heurings would have government contracts list the precise nature and location of every single obstacle, excavation site, or hazard requiring fencing. The government cannot provide this prophetic guidance, and the "encyclopedic" contracts required to do so are unnecessary. ***Estate of Brown***, 313 Wis. 2d 497, ¶13. The plans and specifications included in the summary judgment materials provided reasonably precise guidance about safety precautions and roadway design.

¶13 The second element requires proof that the contractor conformed to the approved design. The record contains no dispute that the roadway was constructed according to the design specifications, and Shawn Heuring's underlying negligence claim assumes that it was. In addition, Michael Swan, A-1's field superintendent, testified at deposition that the appropriate signs, construction barrels, detours, and barricades were in place each day. There is no evidence A-1 or MSA failed to comply with any design or safety requirement included in the summary judgment materials, nor that they engaged in any sort of extemporaneous deviation.

¶14 The Heurings, citing alleged inconsistencies in the testimony of A-1's field manager, claim there is a factual dispute about whether construction barrels remained on Silver Street after its opening. The Heurings fail to complete this argument by identifying a source in the record obligating the contractors to continue safety measures after substantial completion of the project. We will not

search the voluminous record to support the Heurings' argument. *See* ***Grothe v. Valley Coatings, Inc.***, 2000 WI App 240, ¶6, 239 Wis. 2d 406, 620 N.W.2d 463.

¶15 Finally, immunity requires a showing that the contractor warned the supervising governmental authority about possible dangers known to the contractor but not to the government. The Heurings ask us to infer from deposition testimony that "both A-1 and MSA failed to warn the City of Hurley about the known danger that the lip created." To the contrary, the only reasonable inference supported by the testimony suggests the contractors did not consider the exposed curb a hazard to be signed. Martin testified as follows:

> A Our main concerns with [the lack of a final] lift there were snow plowing for the winter and ponding water over the long term for the life of the pavement. We have that edge exposed on a regular basis in projects, you know. When we're paving often the contractors will leave or will have some other task to do, and the lip of concrete is exposed … or accessible to pedestrians on a regular basis, and it generally isn't a problem.
>
> ….
>
> Q Okay. Did you make any recommendations to the city or indicate to them that [the exposed curb] was a problem?
>
> A No.
>
> Q Why not?
>
> A I didn't think of it as a problem, I guess. … [E]very time we build a road, there's a time, a period where … the concrete edge is exposed like that.

Martin's undisputed testimony indicates the contractors never considered the exposed curb a danger to pedestrians. Moreover, the City was already aware of the exposed curb lip from the designs and its own decision to have the DOT place the final lift. Consequently, there is no evidence the contractors "ignore[d their]

duty to the public and [withheld] information about dangers that the government might not know about."[4] *See* ***Estate of Lyons***, 207 Wis. 2d at 457.

¶16 MSA and A-1 also claim summary judgment is appropriate pursuant to RESTATEMENT (SECOND) OF TORTS § 384 (1965). Because we affirm on immunity grounds, we need not reach this issue. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts should decide cases on narrowest possible grounds).

By the Court.—Order affirmed.

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

[4] Martin stated at deposition that, in hindsight, he now thought the curb represented a trip hazard. However, Martin's ex post facto reflection cannot transform a danger unknown at the time of the accident to a known one. Martin's undisputed testimony demonstrates neither MSA nor A-1 notified the City of the exposed curb lip because they did not consider it a danger and, in any event, the City already knew of its existence.