COURT OF APPEALS
DECISION
DATED AND FILED

March 11, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2882 **Cir. Ct. No. 2013CV535**

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

DR. RANDALL MELCHERT, HAPPY HOBBY, INC. AND THE WARREN V. JONES AND JOYCE M. JONES REVOCABLE LIVING TRUST,

PLAINTIFFS-APPELLANTS,

V.

PRO ELECTRIC CONTRACTORS AND SECURA INSURANCE, A MUTUAL COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County: JAMES R. KIEFFER, Judge. *Affirmed*.

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 NEUBAUER, P.J. This is a governmental contractor immunity case in which we conclude that an electrical contractor who damaged a sewer lateral

while installing a traffic light, thereby causing property damage to nearby businesses, was immune from suit under WIS. STAT. § 893.80(4) (2013-14).[1] The contractor was an agent of the Department of Transportation (DOT) and was implementing a discretionary governmental decision. While tenants and owners of nearby property allege that certain allegedly negligent, injury-causing tasks fell outside the shield of immunity, the record does not support any causal connection between their allegations and damages. We affirm the circuit court's grant of summary judgment to the contractor.

BACKGROUND

¶2 The following facts are taken from the pleadings and the summary judgment submissions. The DOT accepted Pro Electric Contractors' bid on a construction project, and Pro Electric entered into a subcontract with contractor Payne & Dolan. On August 22, 2012, Pro Electric installed a concrete base for a new traffic light. Following this work, Dr. Randall Melchert, Happy Hobby, Inc. and The Warren V. Jones and Joyce M. Jones Revocable Living Trust (collectively Melchert), owners and tenants of nearby property, suffered water damage, which they relate to a severed sewer lateral. Melchert alleges that Pro Electric severed the sewer lateral while using a circular auger to dig the hole for the traffic light base. The DOT engineering plan, including drawings, sets forth specifications for the new light to be anchored by a concrete base fourteen feet deep and thirty inches in diameter. The DOT engineering plan specifies the exact location of the light and the dimensions and components of the concrete base.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Further, the DOT plan specifies that "bases shall be excavated by use of a circular auger." The DOT hired a private engineering firm, HNTB, to supervise the project, and an engineer from HNTB watched the Pro Electric employees dig the hole for the traffic light. While the DOT plan gave HNTB authority to determine the final location of installation, there is no indication of any change from the DOT's specifications. There is no evidence that Pro Electric failed to comply with the DOT engineering specifications with regard to the installation of the traffic light. It is undisputed that the sewer lateral was severed during installation, and there are no facts to show that anyone knew about the damage at the time it occurred.

¶3 Melchert filed suit against Pro Electric and its insurer, claiming property damage due to flooding and water damage. According to Melchert's second amended complaint, "Despite the obvious severing of the sewer lateral, the defendant proceeded with the installation … without … any remedial action to repair or reroute the sewer lateral around the pole that was being installed." Pro Electric moved for summary judgment, which the circuit court granted, finding that Pro Electric was an agent of the DOT and was immune from liability under WIS. STAT. § 893.80(4) because Pro Electric "simply did what the Department of Transportation advised them that they were supposed to do." Melchert filed a notice of appeal, after which the court rendered judgment in favor of Pro Electric and awarded it costs over Melchert's objections.[2]

[2] In his brief-in-chief, Melchert argues that the circuit court erred in rendering judgment and awarding costs pending appeal. Melchert concedes, in his reply brief, that the circuit court was authorized to render judgment and award costs. We do not address this issue.

DISCUSSION

Standard of Review

¶4 We review a grant of summary judgment using the same methodology as the circuit court. ***Green Springs Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). That is, we affirm a grant of summary judgment when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. ***Showers Appraisals, LLC v. Musson Bros., Inc.***, 2013 WI 79, ¶21, 350 Wis. 2d 509, 835 N.W.2d 226. In this case, where the circuit court has granted summary judgment on the basis of governmental contractor immunity under WIS. STAT. § 893.80(4), we review independently the circuit court's application of the facts found to the statutory standard. ***Showers***, 350 Wis. 2d 509, ¶21.

Governmental Contractor Immunity

¶5 Under WIS. STAT. § 893.80(4), "[n]o suit may be brought against any [governmental entity] … or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions." Thus, to show that it is entitled to this immunity,

> the governmental contractor must prove both that the contractor meets the definition of "agent" under WIS. STAT. § 893.80(4), as set forth in [***Estate of Lyons v. CNA Ins. Cos.***, 207 Wis. 2d 446, 558 N.W.2d 658 (Ct. App. 1996)], and that the contractor's act is one for which immunity is available under § 893.80(4). Specifically, … for a contractor to come within § 893.80(4)'s shield of immunity, the contractor must prove it was acting as the governmental entity's agent in accordance with reasonably precise specifications, as set forth in ***Lyons***.
>
> ….

> However, analyzing whether the conduct of a governmental contractor was undertaken as a statutory "agent" within the scope of the immunity accorded by WIS. STAT. § 893.80(4) solely by reference to the three-part ***Lyons*** test may lead a court to err. Rather, an equally dispositive question in the § 893.80(4) immunity analysis is whether the relevant decision of the governmental entity that the governmental contractor implements is, itself, entitled to immunity under § 893.80(4) because it was made through the exercise of a legislative, quasi-legislative, judicial or quasi-judicial function of the governmental entity. Stated otherwise, only certain types of acts fall within the immunity shield of § 893.80(4).

Showers, 350 Wis. 2d 509, ¶¶2, 34.

¶6 Following ***Showers***, we first address whether Pro Electric was acting as an agent of the DOT when it severed a sewer lateral while installing the new traffic light. ***Id.***, ¶¶31, 51. Second, we examine whether the decision where and how to install the traffic light was a decision entitled to immunity "because it was made through the exercise of a legislative, quasi-legislative, judicial or quasi-judicial function." ***Id.***, ¶34. Finally, we turn to Melchert's argument that Pro Electric's negligence was outside the shield of immunity.

Pro Electric as Agent of the DOT

¶7 To be entitled to immunity, the governmental contractor must be an agent of the governmental entity. ***Id.***, ¶31. In ***Showers***, the supreme court reaffirmed the application of the ***Lyons*** test as part of the immunity analysis. ***Showers***, 350 Wis. 2d 509, ¶36. The ***Lyons*** test examines whether "(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." ***Lyons***, 207 Wis. 2d at 457-58. As the ***Showers*** court explained, the first two prongs of the ***Lyons*** test, by asking whether the agent is merely carrying out the reasonably precise specifications of the governmental authority, ensure that the discretionary act—the legislative, quasi-legislative, judicial or quasi-judicial decision—is made by the governmental entity, not by the contractor itself.[3] ***Showers***, 350 Wis. 2d 509, ¶30 (citing ***Boyle v. United Techs. Corp.***, 487 U.S. 500 (1988)).

¶8 Here, the DOT issued voluminous, highly detailed, more than "reasonably precise" specifications about the installation of the traffic light. These specifications included the precise dimensions of the concrete base of the light, exactly where to place the light, including how deep and the method by which to dig—with a circular auger. It is undisputed that Pro Electric conformed to the DOT specifications. There is no allegation that Pro Electric knew of any danger about which it did not inform the DOT. Pro Electric was an agent of the DOT under the ***Lyons*** test when it installed the light.

Work Must Be Type for Which Governmental Entity Would Have Immunity

¶9 As noted by the ***Showers*** court, application of the ***Lyons*** test does not end our inquiry. ***Showers***, 350 Wis. 2d 509, ¶34.

> [W]hen a governmental contractor seeks immunity under WIS. STAT. § 893.80(4), the contractor must show *both* that the contractor was an agent as that term is used in § 893.80(4), i.e., as is expressed in the ***Lyons*** test, and that

[3] Some cases use the term "discretionary" to refer to acts that are "legislative, quasi-legislative, judicial or quasi-judicial functions" within WIS. STAT. § 893.80(4). ***Showers Appraisals, LLC v. Musson Bros., Inc.***, 2013 WI 79, ¶3 n.5, 350 Wis. 2d 509, 835 N.W.2d 226.

> the allegedly injurious conduct was caused by the implementation of a decision for which immunity is available for governmental entities under § 893.80(4).

Showers, 350 Wis. 2d 509, ¶36.

¶10 Melchert, in his reply brief, concedes that Pro Electric was a governmental agent "for the specific augering activities that severed the sewer lateral." Furthermore, he does not argue that the engineering plan, detailing where and how to install, i.e., how deep and wide and with an auger, was not part of the governmental design selection, which is a legislative or quasi-legislative decision entitled to immunity under WIS. STAT. § 893.80(4). *See* ***Showers***, 350 Wis. 2d 509, ¶53 (assertions of specific construction errors "are fundamentally different from the assertion that a governmental entity negligently selected a design that a contractor implemented for a government project"). Rather, Melchert argues that certain discrete injurious conduct—the alleged failure to identify and repair the severed sewer lateral prior to backfilling—fell outside the shield of immunity, as discussed below.

¶11 We agree that the governmental project design decision where and how to install the traffic light, as implemented by Pro Electric, is entitled to immunity under WIS. STAT. § 893.80(4) "because it was made through the exercise of a legislative, quasi-legislative, judicial or quasi-judicial function of the governmental entity." ***Showers***, 350 Wis. 2d 509, ¶34.

Viability of Negligence Claims Outside Immunity

¶12 Melchert alleged in his complaint that "[i]t was obvious to the workers at the time that they were drilling through a sewer lateral" but the workers negligently proceeded with the installation, without warning Melchert and without taking any "remedial action to repair or reroute the sewer lateral," causing injury to Melchert. According to Melchert, this case is not about the installation of a traffic light but rather about the backfilling of the hole dug during the installation. As noted above, Melchert concedes that Pro Electric was a governmental agent "for the specific augering activities that severed the sewer lateral." Melchert argues, however, there is no immunity for negligent excavation and construction, and "the mere fact that it acted as a government agent for the augering of the hole does not mean that it acted as a government agent when it backfilled the hole without repairing the severed sewer lateral." Melchert urges us to "focus on Pro Electric Contractors' specific conduct of backfilling the hole without repairing the severed sewer lateral."

¶13 Melchert asserts: "One or more sets of eyes could have caught the severed sewer lateral. More frequent cleaning of the auger would have freed up the hole for more frequent observation. Better illumination could have brought the problem to light." But these assertions are pure speculation. Craig Clements, president of Pro Electric, testified that the workers digging the hole "said they had no idea" that they had severed a sewer lateral. Clements explained that because the sewer line was made of clay and the soil was clay, there is "no dissimilar material coming up" from the auger and therefore no way for the workers to see if they have damaged a sewer line, "no matter how much light would have been used in that hole." Both a Pro Electric employee and the HNTB engineer on site were watching the hole while it was augered. The undisputed facts are that in this

relatively narrow, deep hole, where the auger was working, and where the sewer pipe was made of the same material as the surrounding soil, the damage was not visible and would not have been visible even with more light. There are no facts to show that any of the measures Melchert suggests would have identified the severed lateral, much less any evidence regarding what remedial steps Pro Electric could have or should have taken. Melchert does not point to anything in the record explaining how Pro Electric backfilled the hole versus how they should have done it and whether a change in method would have made a difference. The summary judgment record does not support a causal connection between Melchert's specific allegations of negligence—that the workers did not properly monitor or illuminate the hole or clean the auger often enough—and the alleged injury, regardless of the applicability of WIS. STAT. § 893.80(4). Melchert cannot rest on its pleadings and unsupported assertions of fact in the face of Pro Electric's summary judgment motion and supporting affidavit. *See* ***Helland v. Kurtis A. Froedtert Mem'l Lutheran Hosp.***, 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999) ("A party opposing a summary judgment motion must set forth 'specific facts,' evidentiary in nature and admissible in form, showing that a genuine issue exists for trial. It is not enough to rely upon unsubstantiated conclusory remarks, speculation, or testimony which is not based upon personal knowledge.").[4]

[4] Melchert also seeks to identify a ministerial duty, relying on WIS. STAT. §182.0175(2)(am)6. and 6m., which instruct excavators to "inspect all transmission facilities exposed during excavation" and refrain from backfilling "until an inspection is conducted and any necessary repairs have been made by the owner of the transmission facility." Melchert has made no showing that transmission facilities were exposed during excavation, much less known to exist.

¶14 Finally, we briefly address Melchert's argument that Pro Electric is responsible for the damage to the sewer lateral because the DOT plan says "the contractor is responsible for making his own determination as to the type and location of the underground utilities as may be necessary to avoid damage thereto." The quoted language is on a page of the plan that pertains to "concrete base type 13," while Pro Electric was installing a "concrete base type 10." Melchert replies that the provision applies to both base types because both were to be done with a circular auger. The bottom line is that the contract term making the contractor responsible for locating underground utilities is in the base type 13 portion of the DOT plan. We will not rewrite the DOT plan to make Melchert's case.

CONCLUSION

¶15 The injury-causing design decision about where and how to install the traffic light was a discretionary function of the DOT, and Pro Electric implemented the DOT's reasonably precise specifications in installing the light base. Therefore, Pro Electric is immune from liability for Melchert's damages. Although Melchert attempts to define Pro Electric's conduct to take it out of the immunity umbrella, there is nothing in the record to support a causal connection between Melchert's specific allegations of negligence and the alleged damages. We affirm the circuit court's grant of summary judgment.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.