COURT OF APPEALS
DECISION
DATED AND RELEASED

November 22, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0446

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

JOHN ERICKSON
AND JOYCE ERICKSON,

Plaintiffs-Appellants,

v.

CITY OF JANESVILLE,
A WISCONSIN MUNICIPAL CORPORATION,
FRANK SILHA AND
FRANK SILHA & SONS, INC.,

Defendants-Respondents.

APPEAL from a judgment of the circuit court for Rock County: MICHAEL J. BYRON, Judge. *Affirmed*.

Before Gartzke, P.J., Dykman and Vergeront, JJ.

DYKMAN, J. John and Joyce Erickson appeal from a summary judgment in which the trial court dismissed their negligence action against the City of Janesville, Frank Silha, and Frank Silha & Sons, Inc., a construction

company. The case arises out of property damage which occurred when the City enforced an ordinance prohibiting open excavations. The court dismissed the action against the City, concluding that it was immune from liability under § 893.80(4), STATS., because the City's enforcement of its ordinances and the method of enforcement were discretionary acts. It also dismissed the action against Silha because the Ericksons did not oppose his summary judgment motion.[1] The Ericksons argue that summary judgment was inappropriately granted because the City is not immune from liability and genuine issues of material fact remain as to its negligence. We conclude that the City is entitled to immunity from the Ericksons' claims because the actions complained of constitute discretionary acts. Accordingly, we affirm.

BACKGROUND

In July 1991, John and Joyce Erickson received a foundation permit for a parcel of residential property located in the City of Janesville and began to excavate a basement. The work was completed sometime during the summer and fall of 1991. In September, they applied for a building permit but apparently once the basement was dug and the foundation completed, no other construction proceeded on the project.

The City received several complaints about the open excavation from neighbors, and on July 9, 1992, it sent the Ericksons an Order to Correct. The order directed them to cover their basement walls and backfill the area around the exterior of the basement walls which had remained open and unprotected for over sixty days in violation of § 12.16.030 of the City's ordinances. The City ordered the work to be completed by July 30. The City also indicated that if the Ericksons failed to comply with the order, it would have the work completed at their expense. The Ericksons did not cover or backfill the excavation.

By letter dated September 22, 1992, the City once again directed the Ericksons to cap the basement and backfill the exterior of the basement

[1] The Ericksons do not argue that the trial court erred when it dismissed their action against Frank Silha or Frank Silha & Sons, Inc. Therefore, we affirm the judgment with respect to Silha and this appeal will focus solely on issues pertaining to the City.

walls by October 15. The City noted that the letter would serve as its last and final notice. Again, the Ericksons did not cover or fill in the excavation.

On January 19, 1993, the City sent another letter to the Ericksons, noting that they had failed to backfill and cap their excavation and ordered them to do so within twenty days or the City would do it at the Ericksons' expense. The City, again, wrote to the Ericksons on June 8, noting that children were playing near the open basement and directed them to enclose the excavation with a fence to prevent a child from being injured. Finally, on June 24, the City wrote to the Ericksons and told them that they had five days to either enclose the excavation with a fence or to fill it to grade. The Ericksons did neither.

On July 7, 1993, the City contracted with Silha to fill in the basement as best as it could. It instructed Silha to be as careful as possible. The work was completed between July 7 and 8 at a cost of $920.

The Ericksons brought this action against Silha and the City, alleging that Silha negligently filled in the excavation and that the City negligently enforced its ordinance and negligently supervised Silha's work. They alleged that the City's and Silha's negligence caused extensive property damage to the basement walls, public sidewalk, turf, and drainage and water lines. They also alleged that the negligence caused great emotional trauma and distress. The City moved to dismiss the action, arguing that it was immune from liability under § 893.80(4), STATS. The trial court agreed and dismissed the action. This appeal followed.

STANDARD OF REVIEW

We review a trial court's grant of summary judgment *de novo*. ***Barillari v. City of Milwaukee***, 194 Wis.2d 247, 256, 533 N.W.2d 759, 762 (1995). We apply the same standards and methodology as the trial court, and if the moving party has established a *prima facie* case for summary judgment and no genuine issues of fact are in dispute, the moving party is entitled to judgment. ***Brownelli v. McCaughtry***, 182 Wis.2d 367, 372-73, 514 N.W.2d 48, 49-50 (Ct. App. 1994).

The application of § 893.80(4), STATS., to a set of facts is a question of law which we review *de novo*. ***Estate of Cavanaugh v. Andrade***, 191 Wis.2d 244, 251-52, 528 N.W.2d 492, 495 (Ct. App.), *review granted*, ___ Wis.2d ___, 534 N.W.2d 85 (1995). A determination of what is imposed by a ministerial duty is also a question of law which we review *de novo*. ***Kimps v. Hill***, 187 Wis.2d 508, 513, 523 N.W.2d 281, 284 (Ct. App. 1994), *review granted*, ___ Wis.2d ___, 531 N.W.2d 325 (1995).

IMMUNITY

Section 893.80(4), STATS., provides that a governmental body is immune from liability for injuries resulting from the quasi-judicial and quasi-legislative acts of public officers or employees. A quasi-judicial or quasi-legislative act is synonymous with a discretionary act. ***Sheridan v. City of Janesville***, 164 Wis.2d 420, 425, 474 N.W.2d 799, 801 (Ct. App. 1991).

Three exceptions to this rule are: (1) a public officer or employee does not enjoy immunity if he or she engages in malicious, willful or intentional conduct; (2) a public officer or employee is not immune if he or she negligently performs a ministerial duty; and (3) a public officer is not immune is he or she is aware of a danger that is of "such quality that the public officer's duty to act becomes `absolute, certain and imperative.'" ***Barillari***, 194 Wis.2d at 257-58, 533 N.W.2d at 763 (quoted source omitted). A ministerial duty is one which 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." ***Kimps***, 187 Wis.2d at 513, 523 N.W.2d at 284 (quoted source omitted).

A fourth exception is when the public officer's decision involves the exercise of discretion but the discretion exercised is not governmental, *i.e.*, it does not require the application of statutes to facts nor a subjective evaluation of the law. ***Id.*** In other words, immunity does not attach merely because the official's conduct involves discretion, but when the decision involves the type of judgment and discretion which rises to governmental discretion, as opposed to professional or technical discretion. ***Sheridan***, 164 Wis.2d at 427, 474 N.W.2d at 802. However, this last exception is applicable only to cases involving medical

decisions, ***Stann v. Waukesha County***, 161 Wis.2d 808, 818, 468 N.W.2d 775, 779-80 (Ct. App. 1991), and the cases adopting it, ***Sheridan***, 164 Wis.2d at 427, 474 N.W.2d at 802, and ***Scarpaci v. Milwaukee County***, 96 Wis.2d 663, 685-87, 292 N.W.2d 816, 826-27 (1980), are therefore not relevant to this case.

The Ericksons contend that the City's duty was ministerial in two respects. First, the City had a ministerial duty to include in the written notice the alternatives available to them to attain compliance with the ordinance. They point to Section 12.16.030 which provides:

> A. The owner of any property upon which there are excavations of any kind ... which have been allowed to remain open and unprotected for a period of sixty days from the date of the issuance of the permit for such work, and which, in the opinion of the building inspector, constitutes a hazard, shall, upon written notice from the building inspector, cover, fence or fill in such excavations within twenty days of the date of such notice; failing which, it shall be the duty of the building inspector to see that such work is done by the city, and the costs thereof shall be charged against the real estate upon which such excavation is located and shall be a lien upon such real estate, and shall be assessed and collected as a special tax.
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> B. No excavation shall be left open for more than six months. The requirements of this subsection shall be in addition to the requirements of subsection A. In the event any such excavation remains open for more than six months, the building inspector or other designated officer shall order that a subfloor be installed which would completely cover the excavation or in the alternative that the excavation be filled to grade. The order shall be served upon the owner of the land or his agent and upon the holder of any encumbrance of record. If the owner of the land fails to comply with the order within twenty days after service thereof upon him, the inspector of buildings or other designated officer shall cause the

> excavation to be filled to grade, and the costs thereof shall be charged against the real estate upon which such excavation is located and shall be a lien upon such real estate, and shall be assessed and collected as a special tax. The building inspector in his discretion may extend the time period for thirty, sixty or ninety days, if, in his opinion, weather or other uncontrollable circumstances have unduly delayed the building upon the open excavation.
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> C. The types of excavations to which subsections A and B apply include, but are not limited to:
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> 1. Open excavations for basements;
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> 2. Open basement excavations in which foundations [h]ave been constructed, and upon which no building has been erected or from which a building has been removed;
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> 3. Any foundation in a basement excavation whether supporting a building or not, around which backfilling has not been completed;
>
> 4. Any case where a foundation has failed, and any part of such foundation has fallen in, whether supporting a building or not.

City of Janesville, Wis., Ordinance 12.16.030 (February 1981). They contend that the notices sent by the City were confusing, conflicting and deficient for the purposes of informing them that they were in violation of this ordinance. We disagree.

The ordinance provides that when an excavation is left open for more than sixty days, if the inspector considers it to be a hazard, he or she may send a written notice to the offending party, ordering the party to either cover, fence or fill in the excavation within twenty days. Thus, the inspector has discretion in several respects. First, the inspector may decide whether an excavation poses a hazard. Second, the inspector retains discretion as to whether to enforce the ordinance. And third, once that determination is made,

the inspector may choose which of the several options would best remedy the situation.

The ordinance also provides that if an excavation is left open for more than six months, the inspector shall order the owner of the land to install a subfloor to completely cover the excavation or, in the alternative, to fill the excavation to grade. The ordinance instructs the inspector to send a notice to the offending party. The ordinance, therefore, leaves discretion with the inspector to determine which alternative would best remedy the violation.

The Ericksons argue that the use of the word "shall" imposes a ministerial duty on the City. But the ordinance provides that the *owner* of any property shall cover, fence or fill in the excavation. Thus, this is not a mandatory or ministerial directive to the City, but a directive to the landowner. There is no question but that the City ordered the Ericksons to backfill or cover their open excavation. The Ericksons were also given notice of the ordinance the City charged them with violating. The City was under no obligation to explain the notices further. The ordinance does not impose upon the City a ministerial duty to use the exact language in the ordinance. Instead, it leaves the City with discretion to choose the appropriate remedy.

Second, the Ericksons also argue that the City negligently supervised Silha's work. They argue that the part of the ordinance which provides that if the landowner does not respond to the City's orders, "it shall be the duty of the building inspector to see that such work is done by the city," and the inspector "shall cause the excavation to be filled to grade," imposes a ministerial duty on the City to ensure the proper execution of this work. We disagree.

The ordinance provides that if an offending party fails to respond to the City's written notice of an ordinance violation, the inspector must see that such work is done by the City at the offending party's expense. The Ericksons argue that the City had a duty to supervise Silha's work by providing more instruction and spending time at the site. But the Ericksons do not cite any statutes, rules, policies or orders setting out the procedures to be used when the City hires a contractor to fill in an excavation. Thus, the City's duty to enforce compliance is not one which "imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for

judgment or discretion." ***Kimps***, 187 Wis.2d at 513, 523 N.W.2d at 284. Consequently, we conclude that it is a discretionary duty, entitled to immunity. Indeed, like law enforcement officials, building inspectors must retain the discretion to determine, at all times, how best to carry out their responsibilities. *See* ***Barillari***, 194 Wis.2d at 260-61, 533 N.W.2d at 764. The trial court did not err when it concluded that the City was entitled to immunity.

By the Court.—Judgment affirmed.

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