

WISCONSIN SUPREME COURT
WEDNESDAY, MARCH 13, 2013
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), which affirmed a Winnebago County Circuit Court decision, Judge Barbara H. Key, presiding.

2011AP1158

[Showers Appraisals v. Musson Brothers](#)

This case involves a lawsuit over water damage that occurred to a privately owned building during a road construction project in Oshkosh in the summer of 2008. The Supreme Court examines whether a private governmental contractor is entitled to sovereign immunity under Estate of Lyons v. CNA Insurance Company, 207 Wis. 2d 446, 558 N.W.2d 658 (Ct. App. 1996) for its efforts to maintain water drainage on the construction site so as to protect the adjacent private property from water damage.

Some background: The state hired Musson Brothers to reconstruct about a one-mile stretch of State Highway 44 (Ohio Street) in Oshkosh. The construction work was being done pursuant to an agreement between the city and the state Department of Transportation (DOT).

The agreement called for, among other things, the replacement of the sanitary and sewer mains in an area that included Mark W. Showers' business, Showers Appraisals, at the corner of 6th Street and Highway 144. The contract included DOT's Standard Specifications for Highway and Structure Construction, which stated, in part, that Musson was "solely responsible for the means, methods, techniques, sequences, and procedures of construction."

During the project, Musson removed most of the storm sewer system serving the worksite. The city contends this was contrary to a verbal agreement that Musson would remove the storm sewer piecemeal, block-by-block, so that the bulk of the storm sewer system would remain operational during the course of the construction work.

The area received historically heavy rains June 8 through June 12, 2008, including 4.36 inches of rain on June 12. The worksite flooded, and water eventually channeled its way under Showers' basement floor, which ruptured from the hydrostatic pressure. More than seven feet of water filled Shower's basement, resulting in approximately \$140,000 in uninsured damages.

Showers sued Musson and the city, alleging that his property was damaged as a result of negligence. The city and Musson each filed cross-claims for indemnification, and they each filed motions for summary judgment against all of Showers' claims. The trial court granted summary judgment, reasoning that governmental immunity applied to both the City and Musson.

Showers claimed on appeal that Musson was not entitled to governmental immunity as an agent under Lyons because the contract did not contain "reasonably precise specifications." Showers claimed that Musson had too much discretion as to how to go about its work. Therefore, Showers claimed that Musson fell outside the Lyons criteria because it was too independent from the state to be classified as an "agent."

However, the Court of Appeals held that DOT's standard specifications, combined with DOT's regular oversight of Musson's work, curtailed Musson's discretion in such a way that Musson was subject to "reasonably precise specifications," as Lyons requires. The Court of Appeals found that Musson had immunity under Lyons.

A decision by the Supreme Court could clarify the limits of governmental immunity under the circumstances presented here.