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2017AP1593

State of Wisconsin

IN SUPREME COURT

ALAN W. PINTER,
Plaintiff - Appellant - Petitioner,

v.

VILLAGE OF STETSONVILLE,
Defendant - Respondent.

PLAINTIFF - APPELLANT - PETITIONER'S BRIEF

On Petition for Review from the
Wisconsin Court of Appeals District III

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STATEMENT OF THE ISSUES

1. Whether a Village's oral policy, as testified to unequivocally by the Village president and all of its employees, that raw sewage accumulating in a lift station was to be pumped into a ditch when the raw sewage reached a certain level, creates a ministerial duty that, upon its breach, results in an exception to the governmental immunity of Wis. Stat. § 893.80(4)?

The issue was raised in the trial court and the Court of Appeals and both courts ruled that the oral policy did not create a ministerial duty.

2. What must a plaintiff alleging that a private nuisance maintained by a municipality caused damage to the plaintiff show regarding causation in order to avoid dismissal on summary judgment, especially in the context of a backup from a municipal sewer system? Is expert testimony always required? Why or why not? If so, what must be included in the expert's testimony?

The trial court found that the Plaintiff-Appellant-Petitioner allegations that the Village failed to maintain its sewer system and caused the sewage backup were not supported by any evidence and that the statements made by the Village employees were their personal assumptions as to the cause or suspected cause of the problem, but not sufficient proof or explanation to link the Village's alleged lack of maintenance to the backup of the sewage in the plaintiff's home.

The Court of Appeals determined that the Plaintiff-Appellant-Petitioner was required to have expert testimony to prove causation.

3. Were the evidence and the inferences from that evidence in the summary judgment record sufficient to create a genuine issue of material fact regarding causation on Plaintiff-Appellant-Petitioner's claim for private nuisance?

The trial court and the Court of Appeals, necessarily, while perhaps not directly, found that the evidence and the inferences from the evidence in the summary judgment record were not sufficient to create a genuine issue of material fact as to the causation issue of the private nuisance claim.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The case before the Court involves an unwritten policy of the Village of Stetsonville to pump raw sewage from a lift station when that sewage reached a certain level. The policy was implemented in order to prevent raw sewage from back flowing into the Village residents' homes. This was an unwritten policy but uncontroverted in the record. There does not appear to be a case in Wisconsin holding that an unwritten policy can serve as the basis for the creation of a ministerial duty that, in turn, upon its breach, creates a basis for the exception to governmental immunity of Wis. Stat. § 893.80(4).

In addition, the case provides an opportunity to address the proof needed to prove causation in a private nuisance claim in the context of a sewage backup from a municipal sewer system and, in particular, whether expert testimony is always required to do.

For these reasons publication of the Court's decision will be valuable instruction for lower courts, counsel, and the public.

For similar reasons oral argument will serve to expand upon the written arguments of counsel as to these unique issues.

STATEMENT OF THE CASE

A. Procedural History.

The Plaintiff-Appellant-Petitioner, Alan W. Pinter (hereinafter "Alan"), initiated this case by filing a summons and complaint with the Taylor County Clerk of Court on May 8, 2015. (R. 1 and 2) In addition, Alan filed an amended complaint (with leave of the court) on August 26, 2016. (R. 16, the order granting leave appears at R. 14) The Defendant-Respondent, Village of Stetsonville (hereinafter "Village"), duly answered both complaints. (R. 5 and 17)

The Village moved for summary judgment and filed an affidavit and brief in support of that motion. (R. 20, 21, 22, and 23) Alan opposed the Village's motion for summary judgment and sought partial summary judgment in his favor, filing briefs and affidavits in support of his position. (R. 24, 25, and 26) After the Village filed its reply brief and oral argument (R. 28 and 37), the trial court issued its "Decision on Competing Motions for Summary Judgment" on July 6, 2017. (R. 31, Appendix B)

Alan appealed the trial court's decision by filing a notice of appeal on August 11, 2017. (R. 32) The Wisconsin Court of Appeals, District III, affirmed the trial court's ruling by an opinion dated April 10, 2018. (Appendix A)

B. Statement of the Facts.

This case arises out of an incident which took place on September 10, 2014, in which raw feces and urine backed up into Alan's basement at his house located at 312 Sunrise Court, Stetsonville, Wisconsin. The area that includes Alan's house is particularly prone to sewage backups, and, because of this, the Village has adopted a specific policy to prevent the backups.

Prior to September 10, 2014, there were two backups that occurred at Alan's house when he resided there. In each of these instances he reported the backups to the Village and was assured by the Village that it would follow its procedure to prevent backups in the future. (R. 24, ¶ 2, Pinter deposition, p. 12, line 25 to p. 13, line 19; p. 22, line 20 to p. 25, line 25; p. 27, lines 6-13) The prior owner of Alan's house, Jack Poirier, also experienced a sewage backup in the early 2000s. (R. 26, ¶ 3) The Village was aware of this backup and, in fact, paid Mr. Poirier for damages to his property because of the backup. (R. 26, ¶ 4) Further, the Village reassured Mr. Poirier that procedures would be put in place to prevent the backup from happening again. The Village indicated this would include having a Village employee monitor the sewage levels in the lift station for the sewer system. If the water reached too high of a level, the employee would bypass the system and pump out the sewage into a ditch using a portable pump. (R. 26, ¶ 5)

On September 10, 2014, the Village did not follow the policy that it had developed to prevent sewage backups at the Pinter residence (and the neighborhood in general). This caused feces and urine to flow into Alan's basement creating a dangerous situation and causing extensive damage to his home.

The Village's sanitary sewer system serves a little under 500 people. It is a gravity fed system that contains two lift stations. One of the lift stations, known as the main lift station, is near Alan's house. The lift station consists of a pit and when the sewage reaches a certain level a pump automatically pumps the sewage up into the system where gravity again takes over. (R. 24, ¶ 3, Duellman deposition, p. 20, line 16 through p. 22, line 5) When it rains, stormwater infiltrates the sanitary sewer system and the Village monitors the sewage level of the main lift station carefully. When the sewage reaches a certain level, an alarm system alerts the Village employees and the employees must then physically watch the lift station. (R. 24, ¶ 3, Duellman deposition, p. 30, lines 2-23)

In the main lift station there is a series of 12 rungs that are used if a person would have to crawl into the pit. (R. 24, ¶ 3, Duellman deposition, p. 31, line 23 through p. 32, line 5) When sewage flows into the main lift station, the Village employees watch the number of rungs that are visible to determine when to bypass the system and pump the sewage into a ditch. The pumping is done with a portable 500 gallon pump. The Village's policy on September 10, 2014, as testified to by both employees and by the Village president, was to get the portable pump ready and start pumping the main lift station when the sewage reached the fourth rung from the top. (R. 24, ¶ 3, Duellman deposition, p. 33, line 7 to p. 37, line 7, Appendix C; ¶ 4, Smith deposition, p. 19, line 12 to p. 20, line 19; p. 48, line 16 to p. 49, line 19, Appendix D; ¶ 5, Brunner deposition, p. 26, line 14 to p. 29, line 15, Appendix E) If the policy is not followed, there are backups in residential houses. The automatic pump of the lift station cannot keep up when the

sewage reaches the fourth rung. (R. 24, ¶ 3, Duellman deposition, p. 37, line 4 to p. 38, line 2) The existence of the policy is uncontested.

The policy was set by the prior public works director and then passed down. (R. 24, ¶ 3, Duellman deposition, p. 33, line 5 to p. 34, line 1; p. 36, line 16 to p. 37, line 3; ¶4, Smith deposition, p. 20, lines 13-19; ¶ 5, Brunner deposition, p. 28, lines 10-20) There is no operator's manual for the Village's sanitary sewer system.

This policy is consistent with the assurances the Village made to Jack Poirier when he owned Alan's house. After he experienced a sewage backup, the Village told Mr. Poirier that it would monitor the water levels on lift stations. If the water reached too high of a level, the Village assured him it would pump. (R. 26, ¶ 5) It is also consistent with the assurances the Village gave Alan concerning the two prior backups he experienced.

The sanitary sewer system is supposed to be a closed system that does not allow storm water to infiltrate. (R. 21, ¶ 4; R. 24, Duellman deposition, p. 23, line 24 to p. 24, line 2) The need for such a policy arises from the systemic problem with the Village's sanitary sewer system of storm water entering into the system. This has been a problem since at least 1977. (R. 24, ¶ 5, Brunner deposition, p. 6, lines 3-5; p. 7, lines 4-18) The problem comes from sump pumps in buildings being pumped directly into the sanitary sewer system, by drain tiles hooked directly into the sanitary sewer system, and by old pipes that the storm water leaks into. (R. 24, ¶ 3, Duellman deposition, p. 70, lines 10 to p. 71, line 14; p. 71, line 24 to p. 73, line 1; ¶ 5, Brunner deposition, p.7, line 4 to p. 11, line 7) This comes from the testimony of the Village president and its employees.

On September 10, 2014, Chad Smith took copious notes of the events as they occurred. These notes contained precise time references. This is part of Mr. Smith's normal routine. From these notes he typed a report. (R. 24, ¶ 4, Smith deposition, p. 11, line 25 to p. 12, line 24; p. 13, line 21 to p. 14, line 7, Exhibit 16) The Village president directed him to prepare this report. (R. 24, ¶ 5, Brunner deposition, p. 18, line 17 to p. 19, line 21) The report reflects a detailed chronology of the events of that day and are relied upon in the factual presentation that follows.

At approximately 7:45 a.m. on September 10, 2014, Village employees Chad Smith and David Duellman were notified by an alarm system that the north lift station was experiencing high levels of water. At this time, David Duellman went to watch the north lift station while Chad Smith called Black River Transport to notify it that it may need to pump one of the stations. At approximately 8:00 a.m. David Duellman went to watch the main lift station (the one by Alan's house) and Chad Smith went to the north lift station. (R. 24, ¶¶ 3 & 4, Duellman deposition and Smith deposition, Ex. 16)

Alan informed David Duellman between 8:20 a.m. and 8:40 a.m. that the pipes and floor drain in his house were gurgling and that water was coming in. At about 8:40 a.m. David Duellman called Chad Smith to tell him that the water had risen to the second rung from the top in the main lift station and that he had never seen it this high before. (R. 24, ¶¶ 3 & 4, Duellman deposition and Smith deposition, Exhibit 16) Chad Smith arrived at the main lift station after this call. At that time the sewage was at the second rung and it was already entering Alan's house. Chad Smith also had never seen the sewage that high. (R. 24, ¶ 4, Smith deposition, p. 24, line 19 to p. 25, line 10) Pursuant

to Village policy the main lift station should have been pumped before the sewage reached the second rung. (R. 24, ¶ 5, Brunner deposition, p. 29, lines 11-15, Appendix E; ¶ 4, Smith deposition, p. 25, line 21 to p. 26, line 11, Appendix D) It was not until 9:35 a.m. that the Village decided to finally follow policy and bypass the main lift station. Bypass pumping began at approximately 9:45 a.m. and ended at 10:45 a.m. (R. 24, ¶¶ 3 & 4, Duellman deposition and Smith deposition, Exhibit 16) The pumping started over an hour after the Village policy should have been followed.

The aftermath of the Village's failure to pump the main lift station, pursuant to its policy, was the inflow of feces, urine, and the like into Alan's basement. This caused significant damage. (R. 24, ¶ 2, Pinter deposition, p. 51, line 5 through p. 53, line 1) Indeed, at one point the sewage was shooting four feet high out of the basement bathroom shower drain. (R. 24, ¶ 2, Pinter deposition, p. 54, lines 14 through 22)

After the Village finally bypassed the system and the pumping was complete, David Duellman and Chad Smith came to Alan's house and apologized. (R. 24, ¶ 2, Pinter deposition, p. 57, lines 10 through 14) Later that day at the Village hall, Alan was with David Duellman and Chad Smith who were arguing about the failure to pump out the main lift station. Mr. Smith, in this argument, stated to Mr. Duellman "You know you're supposed to pump the pit, that's what you told me that was our – what we're supposed to do when it hits – hits a certain area. Why didn't you pump it?" To this Mr. Duellman just shook his head. (R. 24, ¶ 2, Pinter deposition, p. 59, line 23 through p. 60, line 20)

The fact that the damage occurred to the Pinter home is uncontested. Indeed, the Village has admitted the items of personal property that Alan needed to replace because of the Village's failure to pump (R. 24, ¶ 6, Requests to Admit 4) and has admitted the estimates for the repair and cleaning of Alan's basement. (R. 24, ¶ 6, Requests to Admit 5 & 6)

The main issue at the trial court level was whether the activities of the Village were entitled to immunity under Wis. Stat. § 893.80(4). The Village moved for summary judgment on this ground in the trial court. Alan opposed that motion and moved for partial summary judgment seeking a determination that the Village was negligent because of the failure to follow its policy and for damages that the Village had admitted.

In play in the trial court case were three exceptions to the governmental immunity of Wis. Stat. § 893.80(4): ministerial duty; known and compelling danger; and nuisance.[1] The trial court in its written decision of July 6, 2017, determined that none of these exceptions apply. (R. 31, Appendix B)

The Court of Appeals affirmed the trial court on all issues. (Appendix A)

In particular, as to the ministerial duty exception to the immunity of Wis. Stat. §893.80(4), the Court of Appeals determined that the oral policy requiring the Village employees to begin using the portable pump when sewage reached the fourth rung from the top of the main lift station was merely an oral directive or a "rule of thumb" passed down from employee to employee. It further determined that there was no formal written

[1] The known and compelling danger exception is not an issue in this appeal.

policy concerning this duty to pump. (Court of Appeals' opinion, ¶ 27, Appendix A) It found that there was no prior case law in Wisconsin finding the existence of a ministerial duty based on an unwritten oral policy that was not adopted or approved by any governmental entity. In doing so, the Court of Appeals, incredibly, found that oral policy could not serve as the genesis of a ministerial duty because witnesses' memories may fail or change over time leaving the precise contours of the purported policy in doubt. (*Id.* ¶ 23) The Court of Appeals did so with no evidence in this case to support such an assertion. It also found that there was an element of discretion that took this out of the realm of a ministerial duty. As explained below, such a finding is not supported by the record and certainly not a proper factor in a summary judgment dismissal.

As to the nuisance exception to the immunity of Wis. Stat. §893.80(4), the Court of Appeals determined that Alan failed to raise a genuine issue of material fact as to whether the Village's failure to repair the sanitary sewer system was a legal cause to the damage to his home in that he did not present expert testimony to show such causation. (*Id.* ¶¶ 39, 42) In doing so, the Court of Appeals relied upon *Menick v. City of Menasha*, 200 Wis. 2d 737, 547 N.W.2d 778 (Ct. App. 1996). (*Id.* ¶ 40)

From the Court of Appeals decision, Alan appeals to this Court.

ARGUMENT

I. STANDARD OF REVIEW

While the standard of review concerning the grant of a motion for summary judgment dismissing a plaintiff's claims is an oft repeated matter, it bears repeating.

Whether summary judgment was properly granted is a question of law. *Fortier v. Flambeau Plastics Co.*, 164 Wis. 639, 651-52, 476 N.W.2d 593, 597-98 (Ct. App. 1991) An appellate court independently reviews a grant of summary judgment de novo using the same methodology as the circuit court. *Hardy v. Hoefferle*, 2007 WI App 264, ¶ 6, 306 Wis. 2d 513, 517, 743 N.W.2d 843, 845. "Under that methodology, the court, trial or appellate, first examines the pleadings to determine whether claims have been stated and a material factual issue is presented." *Preloznik v. City of Madison*, 113 Wis. 2d 112, 116, 334 N.W.2d 580, 582-583 (Ct. App. 1983) The moving party's submissions are examined to determine whether they establish a prima facie case for summary judgment. *Id.* If the moving party has made a prima facie showing, the opposing party's affidavits are examined to determine whether there are any material facts in dispute or inferences from undisputed material facts that would entitle the opposing party to a trial. *Butler v. Advance Drainage Sys.*, 2006 WI 102, ¶ 18, 294 Wis. 2d 397, 411, 717 N.W.2d 760, 767.

II. AN ORAL POLICY OF A MUNICIPALITY CAN CREATE A MINISTERIAL DUTY THAT, WHEN BREACHED, SERVES AS AN EXCEPTION TO GOVERNMENTAL IMMUNITY. ESPECIALLY WHEN THAT POLICY IS DEFINITE, CONSTANT, AND UNCONTRACDICTED.

If an oral policy of a municipality is definite and certain, there is no distinction between it and a written policy. The only distinction between an oral policy and a written policy may be the difficulty of proof of the former. Whether the policy is written or oral, in and of itself, should not be the determining factor. As is noted below, the Court of Appeals disagrees with this statement. The logical inquiry is: "what would be

the difference?" As to a municipality harming its citizenry, an oral policy should enjoy the same recognition as a written policy.

A. Ministerial Duty in General.

Generally, governments are immune for tort liability for discretionary acts under Wis. Stat. § 893.80(4). That provision reads as follows:

> No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

This statute is a codification of the holding of *Holytz v. City of Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962), where this Court abrogated the common law doctrine of sweeping governmental immunity.

There are a number of exceptions to this immunity. The exception first discussed is the ministerial duty exception.

The ministerial duty exception is a recognition of the difference "between discretionary and ministerial acts, immunizing the performance of the former but not the latter." A "[m]inisterial duty is one that 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." *Lodl v. Progressive Insurance Co.*, 2002 WI 71, ¶ 25, 253 Wis. 2d 323, 337 646 N.W.2d 314, 321, quoting *Lister v. Board of Regents*, 72 Wis. 2d

282, 299, 240 N.W.2d 610, 622 (1976)[2]

A ministerial duty must be "... positively imposed by law, and its performance required at a time and in a manner, or upon conditions which are specifically designated..." *Id.* ¶ 26, 253 Wis. 2d at 337-338, 646 N.W.2d at 321, quoting, *Meyer v. Carman*, 271 Wis. 329, 332, 73 N.W.2d 514, 515 (1955) which, in turn, quotes *First Nat'l Bank v. Filer*, 107 Fla. 526, 534, 145 So. 204, 207 (Fla. 1933)

The first step in this analysis is to identify a source of law or policy that imposes the duty. *American Family Mutual Insurance Co. v. Outagamie County*, 2012 WI App 60, ¶ 13, 341 Wis. 2d 413, 423, 816 N.W.2d 340, 345 If liability is premised on either the negligent performance or non-performance of a ministerial duty, then the immunity will not apply. A ministerial duty exists when a statute, regulation, or procedure imposes such a duty. Cases have found duties imposed in an operations policy guideline, an employee policy manual, and a safety regulation. *Lodl v. Progressive Northern Insurance Co., supra.*, (examining an operations policy guideline to determine whether it imposed a ministerial duty); *Bicknese v. Sutula*, 2003 WI 31, ¶25, 260 Wis. 2d 713, 731, 660 N.W.2d 289, 298 (evaluating an employee policy manual); *Umansky v. ABC Ins. Co.*,

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[2] The state of the law concerning governmental immunity and the question of ministerial duty has been severely criticized by two members of this court (one current, one retired).

Justice Grassl Bradley in her dissent in *Melcert v. Pro Elec. Contrs.*, 2017 WI 30, ¶ 52, 374 Wis. 2 439, 471, 892 N.W.2d 710, 726, opines that the use of the discretionary vs. ministerial analysis is a return to the "highly artificial judicial distinctions" criticized in *Holytz*.

In concurrence in *Bostco, LLC v. Milwaukee Metropolitan Sewage District*, 2013 WI 78, ¶ 103, 350 Wis. 2d 554, 613, 835 N.W.2d 160, 190, retired Justice Gableman is critical of the analysis of discretionary and ministerial duties and advocates the adoption of a "planning-operational distinction" to determine issues of immunity.

Both of these criticisms, it is believed, are founded on the premise that certain day-to-day activities of municipal employees are not the type of legislative or judicial policy making that deserve immunity. Further, lurking behind the criticism, it is believed, is the fact that the current analysis of this issue is leaving citizens of municipalities (the very people the municipalities are to protect) damaged without recourse. As it relates to the case at bar, these criticisms boil down to the fact that the failure of the Village's employees to start pumping, as a practical matter, has nothing to do with a legislative or judicial decision.

2009 WI 82, ¶ 18, 319 Wis. 2d 622, 636-639, 769 N.W.2d 1, 8 (examining a safety regulation)

The Village policy regarding bypassing the main lift station is shown in the deposition testimony of the Village's president and its two employees. The policy was definite and certain in requiring employees to bring out a portable pump and start pumping when sewage reached the fourth rung of the main lift station. However, as noted above, the sewage reached the second rung at 8:40 a.m. (two rungs higher than required by the Village's policy to pump) and the pump was not used for another hour until the Village started the bypass at 9:45 a.m. At the time, raw sewage had already backed up into Alan's home.

Under the Village's policy there was nothing remaining for judgment or discretion. This policy creates a specific time (when sewage is at the fourth rung), a specific mode (use a portable pump to bypass), and an occasion (high sewage), for the ministerial duty to be triggered. All three were triggered in this case, imposing a ministerial duty upon the employees to prevent damage.

B. Can There Be An Oral Policy?

The Court of Appeals rejected the argument that the Village had a policy giving rise to a ministerial duty to use the portable pump to prevent damages. It places specific emphasis on the fact that the policy was not in writing. It concludes that an unwritten oral policy is ". . . fundamentally inconsistent with a ministerial duty inquiry, which looks for 'absolute and certain imperative duties that are so specific that nothing remains for judgment or discretion.'" (Court of Appeals opinion, ¶ 23, Appendix A, *quoting, Lister*

v. Board of Regents, *supra*. It criticizes reliance on oral policies as it indicates courts would be forced to rely on witnesses' testimony regarding the policy's existence and scope.[3] *Id.*

It further comments that witnesses' memories may fail and change over time leaving the contours of a purported policy in doubt. Such a statement ignores the procedural posture that this case was decided on summary judgment. Certainly, in every case that is tried, the question of witnesses' memories failing or changing can be an issue. Such a reality cannot reasonably be said to eviscerate an oral municipal policy. If there is differing testimony as to the policy, that needs to be meted out at trial. To state that the issue of witnesses' memories failing or changing automatically negates the effectiveness of an oral policy as a ministerial duty is incorrect. Such logic ignores what occurs in trial courts on a daily basis. If an oral policy is proven there is no reasonable basis to determine that it cannot create a ministerial duty. There is no evidence to suggest that the Village president's and the two Village employees' memories failed or that their stories changed. Also, when there is no written policy manual for the operation of the Village's sanitary sewer system, oral policies must be relied upon and used. A common circumstance in small municipalities that wish to escape the bureaucratic morass of written policies.

Other jurisdictions have recognized that oral policies can create ministerial duties.

[3] Reliance on witnesses' testimony is a fundamental tenet of jurisprudence.

In *Thomas v. County Commissioners*, 293 Kan. 208, 262 P.3d 336 (2011), the Kansas Supreme Court heard a case where a prison was sued for the acts of its staff in failing to monitor an inmate who had been placed on a suicide watch. The policies involved in the suicide watch were a combination of written policies concerning the observation of suicidal inmates and, important to our discussion, an unwritten policy concerning inmates covering their windows. The inmate hung himself in his cell and perished.

One of the issues before the court was whether the prison and its employees were immune from liability under the Kansas Tort Claims Act, K.S.A. 2010 Supp. 75-614(e). That legislation provides for immunity to government agencies and their employees, but has an exception for ministerial actions. Among the suicide prevention policies at issue in the case were written policies concerning the jailers' duties to observe suicidal inmates. In addition, however, there was an unwritten policy that inmates in the suicide observation protocol were not allowed to cover their cell windows. The director of the county department of corrections testified that the policy of not allowing inmates to cover their cell windows was always communicated clearly to the staff. A critical element of the plaintiff's case was that the deceased inmate had, in fact, covered his cell window so that he could not be observed. The Kansas Supreme Court held that this oral policy created a ministerial duty that, upon its breach, was an exception to the statutory immunity.

In the case of *Yanero v. Davis*, 65 S.W.3d 510 (Ky. 2001), the Kentucky Supreme Court heard a case involving a high school baseball player's cause of action against the

board of education, the high school athletic director, the state high school athletic association, and two baseball coaches. The baseball player was allowed to take batting practice without a helmet. He was injured as a result. There was an unwritten rule requiring high school baseball players to wear a helmet during batting practice. The Kentucky Supreme Court affirmed the dismissal of the school district, athletic director, and state high school athletic association, but reversed summary judgment as to the coaches. In doing so, the Kentucky Supreme Court analyzed the immunity provided to government actors under Kentucky law for discretionary acts.[4] The court held that the oral rule requiring high school student athletes to wear batting helmets during batting practice was a ministerial duty that was breached by the coaches. As a result, the coaches were not entitled to immunity.

Further, it is not uncommon for courts to recognize municipalities' oral policies in deciding issues and in various contexts. In *State v. Clark*, 2003 WI App 121, 265 Wis. 2d 557, 666 N.W.2d 112 the court discusses the City of Milwaukee's unwritten policy of towing vehicles that are not locked. The Fifth Circuit Court of Appeals. in deciding a case of excessive police force, acknowledged that, although official policy usually arises in the form of written policy statements, official policy could also arise in the form of a widespread practice that is so common and well-settled as to constitute a custom that fairly represents a municipal policy. *James v. Harris County*, 577 F.3d 612 (5th Cir. 2009) The Tenth Circuit Court of Appeals held that it was constitutional for a school to

[4] These include what the court calls "sovereign immunity," "governmental immunity," and "official immunity" under the Kentucky Board of Claims Act. The distinctions between the different immunities under Kentucky law are not pertinent to our discussion.

have an unwritten policy of requiring students to submit their valedictorian speeches for content review prior to giving them at graduation. *Corder v. Lewis Palmer School District No. 38*, 566 F.3d 1219 (10th Cir. 2009) In addition, the Tenth Circuit Court of Appeals held that an unwritten policy of banning signs and banners from highway overpasses was a content neutral regulation that reasonably restricted the time, place, and manner of protected speech. *Faustin v. City & County of Denver*, 423 F.3d 1192 (10th Cir. 2005) Municipalities can be held liable under 42 USC § 1983 for constitutional violations caused by their official policies including unwritten customs. *Strauss v. City of Chicago*, 760 F.2d 765 (7th Cir. 1985) In *United States v. Mancera-Londono*, 912 F.2d 373 (9th Cir. 1990) the court held that the Drug Enforcement Agency's oral policy regarding inventory procedures was sufficient to support the seizure from a rental vehicle because the policy was sufficiently standardized. In *New Braunfels Independent School District v. Amrke*, 658 S.W.2d 330 (Ct. App. Texas 1983) the court upheld an oral policy of a school district that students suspended for alcohol use would receive scholastic penalties. In *Hood v. Itawamba County*, 819 F. Supp. 556 (D.N. Miss. 1993) the court found that a sheriff's department had an oral policy concerning the handling of prisoners with mental problems. The case noted that the sheriff's department only had four deputies and states: "therefore, oral communication of rules, policies, practices and procedures was not an ineffective means of dissemination." *Id.* at 566

Illustrative of a court adopting an oral policy of a municipality, while faced differing testimony of that policy, is *Nelson v. Moline School District*, 725 F. Supp. 965 (C.D. Dist. Ill. 1989). The *Nelson* case was a challenge to the Moline High School's oral

policy concerning the distribution of non-school literature on school grounds. The testimony varied as to what the policy was, the assistant principal testified that the distribution of political or religious literature on school grounds was prohibited. The principal testified that the policy was to limit the distribution of the materials by making them available at the school office. The court considered all the evidence in the record and determined that the policy was the one expressed by the assistant principal. This is a prime example of how the courts deal with an oral policy that is testified about in different ways. It is the same manner in which courts deal with all issues of fact.

It should make no difference that a policy is an oral policy. Especially in this case where the policy was definite and certain.[5]

C. Element of Discretion.

The Court of Appeals determined that the Village's oral policy contained an element of discretion in what the Village would do when the raw sewage was rising. (Court of Appeals' opinion, ¶ 25, Appendix A)

As to this discretion issue, there was no discretion in the policy. The Village's oral policy was that the system needed to be bypassed by pumping into the ditch when the raw sewage reached the fourth rung of the main lift station. As best put by Chad Smith in his deposition testimony, when asked by the Village's counsel whether, when the sewage reached the fourth rung, the policy was to watch and wait to see if the sewage

[5] The Court of Appeals also puts emphasis on the fact that the oral policy was not adopted by the Village board. (Court of Appeals' opinion, ¶ 22, Appendix A) It is uncontroverted, however, that the policy was derived from the Village's previous public works director. (R. 24, ¶ 5, Brunner deposition, p. 28, lines 10-25, Appendix E)

kept rising. In response, he unequivocally testifies that you do not watch and wait but start pumping at that point because if the sewage got past the fourth rung the system could not keep up. (R. 24, ¶ 4, Smith deposition, p. 49, lines 7-19, Appendix D) This is supported by the testimony of the Village president when he testified that the policy at the time of the incident was to get the portable pump in place and start pumping when the sewage reached the fourth rung. The president goes on to say that if the sewage is at the second rung, the employees should be pumping. (R. 24, ¶ 5, Brunner deposition, p. 26, line 14 to p. 29, line 15, Appendix E) This is echoed by the testimony of David Duellman who testified as to the fourth rung policy and testified that if the level kept coming up beyond the fourth rung that the lift station simply could not keep up. That would necessitate the bypass into the ditch. (R. 24, Duellman deposition, p. 35, line 1 to p. 36, line 6) Appendix C) The Court of Appeal's assertion that employees had discretion when the fourth rung was reached to use pump trucks to remove the sewage from the lift station and transport it to a wastewater treatment facility is not supported by the record. The record shows that at the fourth rung employees had no discretion. Their only option was to pump. At a minimum it is an issue of material fact.

The Court of Appeal's statement concerning a discretionary element apparently relies on the arguments of the Village in the Court of Appeals concerning the use of a tanker truck. (Village's Court of Appeals brief, p. 16) There is no evidence before the court to support such a discretionary element in the Village's policy. The entire record concerning the policy is the deposition testimony of David Duellman, Chad Smith, and Greg Brunner – which is replicated in Appendices C, D, and E. At the fourth rung there

is no discretion to pump the sewage from the main lift station in to a tanker truck or into the ditch. It is the ditch. [6]

D. Rule of Thumb.

The Court of Appeals is dismissive of the Village's oral policy as being a mere "rule of thumb." The Court of Appeal's comments in this regard originate from Alan's counsel asking David Duellman in his deposition if the policy was a "rule of thumb." (R. 24, ¶ 3, Duellman deposition, p. 36, lines 12 to 15, Appendix C) Mr. Duellman in his testimony, other than his answer to this sole question, does not otherwise use this term. (R. 24, ¶ 3, Duellman deposition, p. 33, line 7 to p. 37, line 3, Appendix C) In their testimony, neither the Village president nor Chad Smith use this term. (R. 24, ¶ 4, Smith deposition, p. 49, lines 7-19; p. 19, line 16 to p. 20, line 19, Appendix D; R. 24, ¶ 5, Brunner deposition, p. 26, line 14 through p. 29, line 15, Appendix E)

The Village, and for that matter, the Court of Appeals, obsess over the testimony that the fourth rung rule was a "rule of thumb." The implication is that a "rule of thumb" resides in the lower caste in the society of directives to municipal employees. There is no legal or logical support for such diminution of the term "rule of thumb." The definition of a "rule of thumb" is "a method of procedure based on experience and common sense." Merriam-Webster.com, http://www.merriam webster.com/dictionary/rule%20of%thumb

[6] The Court of Appeals also puts emphasis upon the Village's argument that using pump trucks to remove the raw sewage was the Department of Natural Resources' preferred method of responding to high sewage levels. (Ct. App. opinion, ¶ 25, Appendix A) Such a statement is not supported by the record. The intimation is that the Department of Natural Resources has some magical effect on the policy. While certainly the Village has to follow Department of Natural Resources' regulations for its septic system, that department's own regulations allow for such a bypass. First, Wis. Admin. Code § NR 205.07(1)(u)3. allows a municipality to bypass its system to prevent severe property damage. Second, under Wis. Admin. Code § NR 205.07(1)(k) the Village must take all reasonable steps to minimize or prevent the likelihood of adverse impacts to public health resulting from the noncompliance of the permit. Certainly, Alan's basement and health fit these definitions.

(last visited October 1, 2018) Another definition is ". . . a rule based on practice and experience rather than on scientific knowledge." *Webster's New World College Dictionary*, (4th ed. 2016) That is what the Village's bypass policy is. The Village's experience is that if the procedure is not followed basements will suffer the taint of raw sewage. It seems that the Court of Appeals got caught up in the isolated use of the phrase by counsel in a single question.

Indeed, a "mandatory guideline" has been determined to be a directive that qualifies a municipality's action as ministerial. 18 *McQuillin, Municipal Corporations*, § 15:13 (3 ed.), citing *Thomas v. County Commissioners*, *supra*. The name of the policy or the name placed on the policy should not matter in the analysis of whether a ministerial duty was breached. In this case, a ministerial duty was breached when the Village employee did not bring the portable pump and begin pumping when the sewage reached the fourth rung of the lift station.

E. <u>At a minimum, there is a material issue of fact concerning the oral policy.</u>

The Village's argument concerning discretion, even if it is not supported by the record, brings up a material issue of fact. The discretionary argument formed by the Village may come from the testimony of David Duellman, who responded to the question about a "rule of thumb" and who testified at the fourth rung, the policy was to see if the water kept rising and then to pump. This is at odds with the testimony of Chad Smith and the Village president, who testified that the policy was at the fourth rung to get the

portable pump out and pump, pump, pump! Summary judgment is improper with such a material issue of fact.

III. WHEN A CLAIM IS MADE AGAINST A MUNICIPALITY CONCERNING A BACKUP OF A MUNICIPAL SEWER SYSTEM SOUNDING IN NUISANCE BASED UPON NEGLIGENT CONDUCT, THE CAUSATION REQUIRED TO BE PROVED IS THE SAME AS THE CAUSATION REQUIRED TO BE PROVED IN A NEGLIGENCE CASE. EXPERT TESTIMONY TO PROVE THE CAUSATION IS NOT NECESSARY WHEN THE CAUSATION IS A MATTER OF ORDINARY KNOWLEDGE AND WITHIN THE REALM OF ORDINARY EXPERIENCE.

A. Introductory Comments Concerning Nuisance.

The second exception to the immunity of Wis. Stat. § 893.80(4) to be discussed is that of nuisance. The nuisance exception is explained in two decisions of this Court: *Bostco, LLC v. Milwaukee Metropolitan Sewage District, supra.* and *Milwaukee Metropolitan Sewage District v. City of Milwaukee*, 2005 WI 8, 227 Wis. 2d 635, 691 N.W.2d 658. As applied to this case the holdings are, that, while it is within a municipality's discretion to implement a sewer system in a manner of its choosing, negligently maintaining said sewer system and not doing what the municipality knows needs to be done to prevent damage, constitutes a failure to abate a private nuisance for which there is no immunity under Wis. Stat. § 893.80(4). *Bostco* at ¶ 94-95, 350 Wis. 2d at 610-611, 835 N.W.2d at 188-189; *City of Milwaukee* at ¶¶ 60, 61, 227 Wis. 2d at 678, 641 N.W.2d at 679-680 Since the Village had notice of the problem with its sanitary sewer system concerning infiltration of water, and, perhaps more importantly, notice of how to prevent the overflow of raw sewage into Alan's basement, its duty to prevent the

damage "... was 'absolute, common certain and imperative' – in other words ministerial..." *Bostco*, ¶ 41, 250 Wis. 2d at 582-583, 835 N.W.2d at 174. As this Court explained in *Bostco*, such a conclusion is supported by *Physicians Plus Ins. Corp. v. Midwest Mut. Ins. Co.*, 2002 WI 80 at ¶ 29, 254 Wis. 2d 77, 89-90, 135, 646 N.W.2d 777, 782 where this Court explained that a negligently caused nuisance resulting in significant harm, of which the municipal entity has notice, creates a ministerial duty to abate the nuisance.

The *Bostco* and *City of Milwaukee* cases also analyze and detail the intricacies of nuisance law. Even before Prosser's rather infamous quote on nuisance law,[7] it was acknowledged that discussion of nuisance law was not for the faint of heart. "It is not practical to give, other than a general definition what constitutes a nuisance. A precise, technical definition, applicable at all times to all cases, cannot be given, because of the varying circumstances upon which the decisions are based." Joyce, *Treatise on the Law Governing Nuisances*, § 1, p. 1 (1906). "Indeed, it may be stated, as a general proposition, that every enjoyment by one of its own property, which violates the rights of another, in an essential degree, is a nuisance, and actionable as such at the suit of the party injured thereby." Wood, *A Practical Treatise on the Law of Nuisances*, § 1, p. 2 (3d ed. 1893) Out of this relative murk, this court has accepted the Restatement (Second) of Torts' characterization of a private nuisance as "[a] non-trespassory invasion of

[7] "[T]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in pie." W. Page Keeton et. al., *Prosser and Keeton on Torts* § 86, at 616 (5th ed. Lawyers ed. 1984)

another's interest in the private use and enjoyment of land." *Bostco*, ¶ 30, 350 Wis. 2d at 575-576, 835 N.W.2d 171 citing *City of Milwaukee*, *supra.*, ¶ 25 note 4, 277 Wis. 2d 658, 691 N.W.2d 669, (other citations omitted) This Court has developed, the following elements for parties seeking to establish liability for a private nuisance:

> 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.
>
> *Bostco*, ¶ 31, 250 Wis. 2d 576, 835 N.W.2d 171 *citing* Restatment (2d) of Torts, Section 822; *City of Milwaukee*, ¶ 32, 277 Wis. 2d at 660, 691 N.W.2d at 671[8]

In regard to these elements, many of the elements concerning Alan are uncontroverted. There is no dispute that there was in fact a nuisance. There was an invasion of his property rights by the influx of raw sewage into his basement. It is also uncontroverted that the Village knew of the problem as it had occurred three prior times at the Pinter residence (twice when Alan owned the residence and once when his predecessor in title owned the residence). The Village assured Alan and his predecessor in title that they had a pumping procedure in place to abate this nuisance. Also, it is uncontroverted that the Village did not pump the lift station in time to prevent damage to

[8] This case was analyzed and litigated on the private nuisance theory. As a result, the elements for a private nuisance are included in this brief. Public nuisance is not explored except to the extent necessary when discussing the interaction between nuisance and negligence à là *Physicians Plus.*

Alan's real estate.

What is left, and what the Court of Appeals hung its hat on, is the issue of causation. It ruled that causation was not proven as there was no expert testimony concerning the cause of the stormwater infiltration into the sewer system. The Court of Appeals relied upon *Menick v. City of Menasha, supra.*, in so holding. An examination follows of the causation prong of a nuisance action and, necessarily, of the *Menick* decision itself.

B. In a Nuisance Action Causation is Analyzed Under the Law of Negligence.

One of the elements shared by a cause of action sounding in negligence and a cause of action sounding in nuisance is that of causation. *Physicians Plus, supra.*, ¶ 30, 254 Wis. 2d at 115, 646 N.W.2d at 794. In this regard, Wisconsin law also follows the Restatement which directs the causation in a nuisance action to its discussion of causation in negligence actions. Restatement (Second) of Torts, § 822 (1979), comment e.

In a negligence action in Wisconsin, the causation element is whether the negligence is a "substantial factor" in causing the damage. *Merco Distributing Corp. v. Commercial Police Alarm Co. Inc.*, 84 Wis. 2d 455, 267 N.W.2d 652 (1978); Wis. JI. – Civil 15 (2006). This mirrors the Restatement that provides, what it terms "legal clause", is conduct that is a substantial factor in bringing about the harm. Restatement (Second) of Torts, § 431 (1965). As stated by the Restatement: "The word 'substantial' is used to denote the fact that the defendant's conduct was such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in

which there always lurks the idea of responsibility..." Restatement (Second) of Torts, § 431, comment a., as quoted with approval in *Retzlaff v. Soman Home Furnishings*, 260 Wis. 2d 615, 620, 51 N.W.2d 514, 515-516 (1952).

So, what would a reasonable person see in the case at bar?[9] A reasonable person would see a combination of the failure of the Village to do anything about its water infiltration into its sanitary system for approximately forty years and its failure to pump the sewage out of the main lift station into the ditch when the sewage was at the fourth rung of the lift station. The infiltration of the storm water into the sanitary system comes from, as testified by the Village itself, a combination of: sump pumps directly pumping into the sanitary sewer system; drain tiles being hooked directly into the sewer system; and, leaking pipes in the sanitary sewer system itself. This testimony comes from the Village president on down. (R. 24, ¶ 3, Duellman deposition, p. 70, line 10 to p. 71, line 14; p. 71, line 24 to p. 73, line 1; ¶ 5, Brunner deposition, p. 7, line 4 to p. 11, line 7) The stormwater causes the sewage in the main lift system to rise to a point where the lift station cannot keep up. If not acted upon, as apparent here, the raw sewage backs up into residential houses, including Alan's. A reasonable person, or put more aptly, a reasonable juror, based on the "idea of responsibility" and, quite frankly, common sense, could see the causation as uncontroverted.

C. No Expert Testimony is Necessary When the Causation is Admitted.

The Court of Appeals' decision as to the need for expert testimony, puts to the

[9] A possibility denied in this case as it was decided on summary judgment.

forefront the case of *Menick v. City of Menasha, supra.* In *Menick* the plaintiff brought an action against the City of Menasha after raw sewage from the city's sewer system had twice flooded her basement causing her significant damage. She brought an action against the city under five theories of recovery, including private nuisance. The private nuisance analysis in that case boiled down to a causation analysis. The plaintiff in *Menick* grounded her case of private nuisance on a theory of strict liability. The argument was because Menasha operated a sewer system and sewage backed up in to her residence, the City was liable. She did not provide any expert testimony or "... advance any theory of liability supported by specific allegations of negligence on the part of the City." *Id.*, 200 Wis. 2d at 748, 547 N.W.2d at 782[10,11]

The case before the court is quite different. Alan has laid out the details of the causation through the admissions of the Village itself. In short, there is no evidence other than the facts that stormwater enters the Village's sanitary sewer system through the connection of sump pumps, the connection of drain tiles, and the poor condition of the pipes, which cause the lift station to overflow to the point where it could not keep up and that the Village did not pump to abate this nuisance. Alan does not rely on the theory of strict liability.

Expert testimony is not necessary to assist the trier of fact concerning matters of common knowledge or those within the realm of ordinary experience. If the court or the

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[10] The plaintiff in *Menick* also argued that she should be able to prosecute her case under the theory of *res ipsa loquitor.* No claim is made in this case under that theory.

[11] In that regard, *Menick's* argument is similar to an argument that the infiltration of raw sewage into her basement from city pipes is nuisance *per se. See Sullivan Realty & Improv. Co. v. Crockett*, 158 Mo. App 573, 138 S.W. 924 (1911) (hotel's discharge of raw sewage was a nuisance *per se*), *c.f., Johns v. Platteville*, 163 Wis. 219, 157 N.W. 761 (1916) (city's discharge of sewer onto highway and then to a water course was seen as a nuisance, the case is a reversal of the trial and heavily fact laden). The concept of nuisance *per se* was not advanced in this matter.

jury is able to draw its own conclusions without the expert testimony, the admission of expert testimony is not only unnecessary but improper. *Racine County v. Oracular Milwaukee, Inc.*, 2010 WI 25, ¶ 28, 323 Wis. 2d 682, 700, 781 N.W.2d 88, 96-97.

As explained in that case:

> The requirement of expert testimony is an extraordinary one. *White v. Leeder*, 149 Wis. 2d 948, 960, 440 N.W.2d 557 (1989). Expert testimony is often required when "unusually complex or esoteric" issues are before the jury because it serves to assist the trier of fact. See Wis. Stat. § 907.02; *White*, 149 Wis. 2d at 960; *City of Cedarburg Light & Water Comm'n v. Allis Chalmers Mfg. Co.*, 33 Wis. 2d 560, 567, 148 N.W.2d 13 (1967). In contrast, expert testimony is not necessary to assist the trier of fact concerning matters of common knowledge or those within the realm of ordinary experience. See *Netzel*, 51 Wis. 2d at 6; *Cramer v. Theda Clark Mem'l Hosp.*, 45 Wis. 2d 147, 150, 172 N.W.2d 427 (1969). In fact, if the court or jury is able to draw its own conclusions without the aid of expert testimony, "the admission of such testimony is not only unnecessary but improper." *Cramer*, 45 Wis. 2d at 151.
>
> *Id.*

In *Racine County* there was a contractual dispute between Racine County and one of its vendors. Racine County did not name any expert witnesses. The trial court ruled against Racine County on summary judgment based upon the defendant's argument that Racine County, to carry its burden of proving that the vendor had breached its standard of care, needed expert testimony to do so. The Court of Appeals disagreed and this Court disagreed (albeit on other grounds). This Court found that the alleged breaches concerned matters of common knowledge and were within the realm of ordinary experience. In particular, the allegations were that the vendor breached the agreement by not completing the project on time and by failing to provide competent training. On

those breaches, so this Court held, the trier of fact was capable of drawing its own conclusions without the assistance of expert testimony.

Alan's case falls within the same genre. We know from the admissions of the Village how the water gets into the sanitary sewer system and what it causes the sanitary sewer system to do (overflow to the point that the lift station cannot keep up) and what the Village needed to do (pump). Expert testimony is not needed to further clarify this line of causation. See *State v. Kandutsch*, 2011 WI 78, ¶ 40, 336 Wis. 2d 478, 496, 799 N.W.2d 865, 874 (holding that, under a common sense perspective, the state was not required to have an expert witness testify concerning the intersection of radio signals from an electronic monitoring device and telephone connections as the issue was not "unusually complex or esoteric" that the jury required the aid of expert testimony to interpret the information.)

The Village and, frankly, the Court of Appeals use *Menick* as the end all in the causation analysis. As is shown above, *Menick* is dramatically distinct from the case at bar in that the plaintiff in *Menick* relied on a strict liability theory and did not provide any other evidence of causation. Here the evidence of causation is replete and comes from the mouth of the Village itself. In the common sense analysis no expert testimony is necessary. At a minimum, there is a material issue of fact concerning the causation issue, but such is hard to imagine given the admissions of the Village. Alan has shown causation in an uncontroverted manner as a matter of law.

D. Conclusion as to nuisance.

In this Court's order accepting Alan's petition for review, the parties were directed to address the private nuisance issue, in particular, the causation prong of such a cause of action. As is shown above, causation in a nuisance action is the same as in a negligence action and boils down to a reasonable person determining whether the tortfeasor's action or inaction was a substantial cause of the harm. Here the combination of the condition of the sewer system (admitted by the Village) and the failure to pump combine to show this causation. In such a circumstance expert testimony is not required. Indeed, it is difficult to imagine what an expert would testify to.

CONCLUSION

This Court should reverse the Court of Appeals' decision and remand the matter to the trial court. On remand, this Court should direct that summary judgment be entered in favor of Alan concerning the existence of a ministerial duty and its breach. In addition, the remand should provide that Alan has shown causation in his nuisance claim. In the alternative, this case should reverse the Court of Appeals and remand the matter as summary judgment was improper given material issues of fact that are present.

(signature on following page)

Dated this 3rd day of October, 2018.

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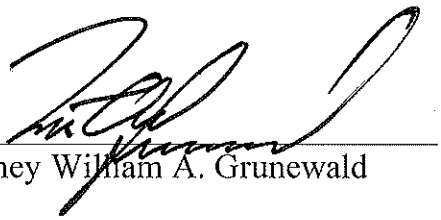
CERTIFICATIONS

I certify as follows:

A. This brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,693 words.

B. The text of electronic copy of the brief filed with the court is identical to the text of the paper copy of this brief.

Date: October 3, 2018



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WISCONSIN SUPREME COURT

ALAN W. PINTER,

Plaintiff-Appellant-Petitioner,

v.

Appeal No.: 17AP1593
Circuit Court Case No.: 15CV44

VILLAGE OF STETSONVILLE,

Defendant-Respondent.

Appeal from the Circuit Court for Taylor County
the Honorable Ann N. Knox-Bauer, Presiding

BRIEF OF DEFENDANT-RESPONDENT VILLAGE OF STETSONVILLE

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STATEMENT OF THE ISSUES

I. Can a former municipal employee's unwritten "rule of thumb" regarding how to handle a situation impose a ministerial duty on current employees faced with a similar situation?

II. What must a plaintiff alleging that a private nuisance maintained by a municipality caused damage to the plaintiff show regarding causation in order to avoid dismissal on summary judgment, especially in the context of a backup from a municipal sewer system? Is expert testimony always required? Why or why not? If so, what must be included in the expert's testimony?

III. Were the evidence and the inferences from that evidence in the summary judgment record sufficient to create a genuine issue of material fact regarding causation on Plaintiff-Appellant-Petitioner's claim for private nuisance?

STATEMENT OF THE FACTS AND OF THE CASE

Defendant-Respondent Village of Stetsonville ("the Village") owns and operates a wastewater collection and treatment system ("the System"). (R. 24, pp. 12-13). The System is primarily gravity fed. (R. 22, p. 4). However, wastewater is pumped at the North Lift Station on Finch Street and again at the Main Lift Station on Mink Avenue. (R. 22, p. 4). Shortly after being pumped at the Main Lift Station, the wastewater reaches the Village's treatment plant, which is located on the west branch of the Big Eau Pleine River. (R. 22, p. 4); (R. 24, p. 20). Once there, the wastewater is treated and pumped into the river. (R. 22, p. 4).

The two lift stations are equipped with tanks where wastewater pools before being pumped upward to continue its journey to the treatment plant. (R. 22, pp. 4, 8). The tank at the Main Lift Station is a four-foot-wide, twenty-foot-deep concrete cylinder. (R. 22, p. 8). The tank at the North Lift Station is a four-foot-wide, twelve-foot-deep concrete cylinder. (R. 22, p. 8).

During heavy rains, outside water enters the System and can result in more volume than the lift stations can handle. (R. 22, p. 4); (R. 24, p. 24). If that happens for a long enough period of time, Village employees have to remove water from the lift stations in order to prevent wastewater from backing up into homes. (R. 22, p. 7).

The Department of Natural Resources ("DNR") regulates the operation of wastewater systems. Its preferred method to manage high water situations is to remove excess wastewater from the lift station tanks using pump trucks that haul the wastewater to the treatment plant. (R. 22, p. 10). The alternative is to pump the excess wastewater into a ditch that flows directly to the river. (R. 22, p. 6). The former removes less wastewater. (R. 28, p. 14). The latter removes more but also creates an environmental hazard.[1] (R. 22, p. 7).

[1]The DNR generally prohibits pumping untreated wastewater into a public waterway. Wis. Adm. Code § NR 205.07(1)(u). The only relevant exception to that prohibition is found at Wis. Adm. Code § NR 205.07(1)(u)3. It allows a municipality to "bypass" treatment if the municipality can demonstrate: 1) the bypass was necessary to prevent personal injury or severe property damage; 2) there was no feasible alternative, such as using pump trucks to haul excess wastewater for treatment; and 3) the municipality reports the bypass.

Heavy rains have sporadically overwhelmed the System since at least 1977. (R. 24, pp. 23-24). On September 10, 2014, the System backed up during a high water situation, resulting in flooding in Plaintiff-Appellant-Petitioner Alan Pinter's basement. (R. 24, p. 33). Prior to September 10, 2014, there had been three other backups that affected Pinter's home, with the first occurring "in the early 2000s." (R. 24, pp. 2-3); (R. 26, p. 1). Two of the previous backups occurred while Pinter owned the home. He concedes those backups were relatively minor. (R. 24, pp. 3-4).

On September 10, 2014, the Village had two public works employees. (R. 24, p. 25). One of them, David Duellman, was certified by the DNR to operate the System.[2] (R. 24, pp. 11-12). The Village did not have a operations manual or other written policy instructing employees how to deal with a high water situation. (R. 24, p. 15). Instead, managing those situations was left to the employee certified to operate the System. (R. 24, p. 15). A *former* employee, Mike Danen, had developed an unwritten "rule of thumb" for high water

[2]Certification of wastewater system operators is required by Wis. Adm. Code § NR 114.53(1).

situations. (R. 22, p. 6). Duellman described Danen's rule as follows:

> Q. Okay. And do you use these rungs as a guide at all, or did you use the rungs as a guide at all, when you worked for the Village?
>
> A. When I worked with Mike, I did use them as a guide.
>
> Q. Describe that to me.
>
> A. He basically told me, he says, well, if you see this many rungs going down, you're getting close where you might have to start bypassing.
>
> Q. Okay. So correct me if I'm wrong. So the water's getting higher, and you're seeing less rungs?
>
> A. Exactly.
>
> Q. And that would be a way to determine if you needed to bypass?
>
> A. An indication that tells you, yep, you better get prepared for it because if it doesn't -- if the -- if the liquid level doesn't keep coming down and keeps accumulating, it's going to -- you're just backing everything up.
>
> Q. Okay. The -- and there was a certain level of -- by virtue of looking at the rungs, that you would get ready to bypass?
>
> A. Yes.
>
> Q. And what was that?
>
> A. I believe it was four.
>
> Q. Okay. And just so I'm clear, would that be four rungs still visible?
>
> A. Yes.
>
> ***

Q. And at -- when would you decide to start the pump? At a certain rung?

A. Start the pump -- if we seen the level in the lift station, the wet-well lift station, coming up yet, then we'd fire it up and get it ready to go.

Q. Okay. When would you start it? When would you start pumping?

A. It depends on -- if it's still raining out, if the level in the lift station is still coming up, you know, you got to get going on it.

(R. 22, p. 6).

Chad Smith, the second public works employee on duty on September 10, 2014, testified:

Q. (W)hat was the protocol if the – if the level in the tank of the lift station would continue to rise?

A. We would monitor the rungs...(a)nd once it gets to the fourth rung, we would do a bypass.

***

Q. So it would be – the – whatever was there, the wastewater, stormwater, would be discharged into the ditch, basically?

A. Yes.

Q. And that was the protocol at the fourth rung?

A. Yes.

Q. Okay. And was that a policy of the Village (on September 10, 2014)?

A. It wasn't in any of the paperwork. It was just by what the previous operator taught (Duellman) and what (Duellman) taught me.

(R. 24, p. 21).

Smith also testified, however, that "the DNR doesn't want you to bypass" and that having "a hauler come in and start sucking out the lift stations" was one of the "things we had to do before we would bypass." (R. 28, p. 15). That testimony is consistent with DNR regulations. *See* Wis. Adm. Code § NR 205.07(1)(u)(3)b.

At 7:45 a.m. on September 10, 2014, it had been raining for some time. (R. 22, p. 8). Duellman received a high water notification from the North Lift Station. (R. 24, p. 33). Upon receiving the notification, he went to watch that station while Smith called Black River Transport, the company that provides pump trucks, to alert them the Village might need a truck. (R. 24, p. 33). At 8:01 a.m., Smith instructed Black River Transport to pump the North Lift Station. (R. 24, p. 33). By 8:28 a.m., Smith had taken over at the North Lift Station, where pumping was underway. (R. 24, p. 33). Duellman went to the Main Lift Station. (R. 24, p. 33).

Pinter checked his basement that morning to see if there was any flooding. (R. 24, p. 6). It was dry. (R. 24, p. 6). However, his wife heard "gurgling" in the pipes and feared a

backup was coming. (R. 24, p. 6). Pinter went to the Main Lift Station and talked to Duellman. (R. 24, pp. 7, 33). He informed Duellman of the gurgling and asked if the tank needed to be pumped into the ditch. (R. 24, pp. 7, 33). Duellman said it did not and that he was watching it. (R. 24, pp. 7, 33). He further explained he had "a truck coming in to empty it out." (R. 24, pp. 7, 33).

Some time thereafter, Pinter's wife called to tell him the basement was flooding. (R. 24, p. 7). Pinter went back to the Main Lift Station where he observed the Black River Transport truck pumping. (R. 24, pp. 7-8). After again speaking with Duellman, Pinter went home to assist his wife. (R. 24, p. 9). They observed the water levels in the basement recede. (R. 24, p. 9). Unfortunately, there was a residue of human waste on the floor where the water had been. (R. 24, p. 9).

Shortly thereafter, Pinter saw the pump truck leave the Main Lift Station to dump its load at the treatment plant. (R. 24, p. 10). He then noticed the water level in his basement rising again. (R. 24, p. 10). He told Duellman, who began pumping

excess wastewater directly into the river. (R. 24. p. 10). The water in Pinter's basement again receded. (R. 24, p. 10).

Pinter filed this action on May 8, 2015. (R. 1). He alleged the Village was negligent by not pumping untreated wastewater into the river sooner and by not repairing damaged pipes he claims allowed rainwater to enter and overwhelm the System. (R. 16). He later amended his complaint to include a private nuisance claim based on the same alleged negligence. (R. 15).

The circuit court, per the Honorable Ann N. Knox-Bauer, entered a scheduling order. (R. 15). The order required Pinter to name expert witnesses on or before January 16, 2017. (R. 15). Pinter named five experts. (R. 18). He indicated, however, that none would testify in support of his claim that the Village was negligent in failing to maintain pipes or in otherwise failing to properly maintain the System. (R. 18). Instead, the experts would testify regarding Pinter's alleged damages and regarding the ineffectiveness of a "back flow valve" and other measures some homeowners take to prevent backups. (R. 18). Testimony

regarding the latter was relevant to the Village's contributory negligence defense. (R. 17, p. 2).

The Village moved for summary judgment. (R. 19). It argued it was entitled to immunity under Wis. Stat. § 893.80(4). (R. 20). It also noted that, in any event, Pinter's negligent maintenance claim failed because there was no evidence of *any* negligent maintenance, much less negligent maintenance that was causally connected to the September 10, 2014 backup. (R. 20).

Pinter contended the Village was not entitled to immunity because Danen's "rule of thumb" imposed a ministerial duty on Duellman and Smith to begin pumping wastewater into the river when the water reached the fourth rung of the Main Lift Station tank. (R. 25). He also argued the Village was not immune from liability resulting from negligent maintenance of the System and that there was sufficient evidence for a jury to find causal negligence. (R. 25).

The court granted the Village's motion for summary judgment. (R. 31, p. 3) (A-Ap 126). It concluded Danen's "rule of thumb" did not create a ministerial duty so the Village was

entitled to immunity even if Duellman and Smith were negligent in not pumping wastewater into the river sooner. (R. 31, p. 2) (A-Ap 125). It found the Village was *not* immune from Pinter's negligent maintenance claims but concluded there was insufficient evidence to support the claims. (R. 31, p. 3) (A-Ap 126). Pinter appealed.

The court of appeals affirmed. It noted Danen's unwritten standard had not been codified or otherwise implemented by the Village Board. Pinter v. Village of Stetsonville, 2018 WI App 35, ¶ 22, 382 Wis.2d 272, 915 N.W.2d 730. It further noted that even if the "rule of thumb" had been codified, it left room for employees to exercise judgment and discretion when faced with a high water situation. Id. at ¶ 24. The court also affirmed the dismissal of Pinter's negligent maintenance claims. It agreed the Village was *not* entitled to immunity but concluded Pinter needed expert testimony to prove causal negligence. Id. at ¶ 39-45.

Pinter petitioned this court for review. The court granted the petition. For the reasons set forth below, the Village now respectfully requests the court affirm the court of appeals decision.

STANDARD OF REVIEW

Appellate courts review a grant of summary judgment independently using the same methodology as the circuit court. Melchert v. Pro Electric Contractors, 2017 WI 30, ¶ 16, 374 Wis. 2d 439, 892 N.W.2d 710. Summary judgment is appropriate if the record shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2).

The application of Wis. Stat. § 893.80(4) and its exceptions involves the application of legal standards to a set of facts. Lodl v. Progressive Northern Ins. Co., 2002 WI 71, ¶ 17, 253 Wis. 2d 323, 646 N.W.2d 314. It is accordingly a question of law that is reviewed de novo. Id. Whether expert testimony is necessary to prove a given claim is also a question of law this court reviews de novo. Racine County v. Oracular Milwaukee, Inc., 2010 WI 25, ¶ 24, 323 Wis. 2d 682, 781 N.W.2d 88.

ARGUMENT

Pinter, with regard to both his ordinary negligence and private nuisance claims, alleges the Village was causally negligent in two ways: 1) by not pumping untreated wastewater into the river sooner; and 2) by not fixing broken pipes or otherwise not properly maintaining the System. (R. 16). The claims based on the first negligence theory fail as a matter of law because the Village is entitled to immunity under Wis. Stat. § 893.80(4). The claims based on the second theory fail as a matter of law because there is no evidence the Village was negligent in maintaining the System and no evidence that any such negligence was a cause of the September 10, 2014 backup.

I. A Former Municipal Employee's Unwritten "Rule of Thumb" Regarding How to Handle a Situation Cannot Impose a Ministerial Duty on Current Employees Faced with a Similar Situation.

Section 893.80(4) immunizes municipalities against liability for "legislative, quasi-legislative, judicial, and quasi-judicial acts," which have collectively been interpreted to include any act that involves the exercise of discretion. Milwaukee Metro. Sewerage Dist. v. City of Milwaukee, 2005 WI 8, ¶ 54, 277 Wis. 2d 635, 691 N.W.2d 658. The defense of

discretionary immunity assumes negligence and focuses on whether the action or inaction upon which liability is premised is entitled to immunity. Umansky v. ABC Ins. Co., 2009 WI 82, ¶ 12, 319 Wis. 2d 622, 769 N.W.2d 1.

Discretionary immunity is based on "public policy considerations that spring from an interest in protecting the public purse and a preference for political rather than judicial redress." Id. at ¶ 9. There are four exceptions to immunity. Immunity does not apply when liability is premised on: 1) ministerial duties imposed by law; 2) duties to address a known and compelling danger; 3) actions involving professional discretion; and 4) actions that are malicious, willful and intentional. Pries v. McMillon, 2008 WI App 167, ¶ 16, 314 Wis. 2d 706, 760 N.W.2d 174.

Only the ministerial duty exception is at issue in this case. A duty is ministerial 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. Bd. Of Regents,

72 Wis. 2d 282, 301, 240 N.W.2d 610 (1976). In other words, for a duty to be ministerial, the public 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. In the context of a ministerial duty, "bound by law" means bound "by an act of government." DeFever v. City of Waukesha, 2007 WI App 266, ¶ 8, 306 Wis. 2d 766, 743 N.W.2d 848. An "act of government" can include statutes, administrative rules and written policies. Id.

Pinter contends Duellman and Smith had a ministerial duty to pump untreated wastewater from the Main Lift Station tank into the river when the wastewater reached the fourth rung of the ladder leading to the bottom of the tank. (Pinter Brief, pp. 14-23). The contention fails for two reasons: 1) the "policy" Pinter contends imposed the ministerial duty was not binding on Duellman and Smith; and 2) even if the "policy" was binding on Duellman and Smith, an unwritten policy like the one Pinter alleges cannot impose a ministerial duty.

A. The "policy" Pinter contends imposed the ministerial duty was not binding on Duellman and Smith.

The "policy" Pinter relies on is the "rule of thumb" followed by a *former* public works employee, Mike Danen. (R. 24, p. 27). There is no evidence in the record as to when or how Danen developed his rule. There is no evidence the Village Board ever codified or otherwise adopted the rule. The only reason Duellman and Smith were even *aware* of Danen's rule is that Danen had told Duellman about it during the time their employments overlapped. (R. 22, p. 6).

On September 10, 2014, Danen no longer worked for the Village, and Duellman was the only employee certified to operate the System. (R. 24, pp. 11-12, 25). Smith helped him do so. (R. 24, p. 25). Duellman therefore held the position Danen had *formerly* held. (R. 24, pp. 25, 27). Why then were Duellman and Smith bound to follow *Danen's* "rule of thumb"? Why did Duellman not have the same authority as Danen to develop and follow his own standards? Pinter makes no effort to answer these threshold questions, even though the first step in showing a ministerial duty is to identify the "source of law" that imposes the alleged duty. American Family Mut. Ins. Co.

v. Outagamie County, 2012 WI App 60, ¶ 13, 341 Wis.2d 413, 816 N.W.2d 340.

The Village Board certainly *could have* adopted a policy that dictated how its public works employees would respond to high water situations. But that is not what the Board did, at least not until after September 10, 2014. (R. 24, p. 34). Instead, the Board left it to the employee certified to operate the System to decide how to handle high water situations. (R. 24, p. 15). Duellman was that employee on September 10, 2014. (R. 24, pp. 11-12, 25). Even assuming he handled the high water situation differently than Danen would have, doing so was within his authority as "the man in charge of the sewer." (R. 24, p. 11-12, 25, 27). He was not bound by Danen's "rule of thumb" because he had the same authority and discretion as Danen to decide how to handle high water situations.

Responding to the high water situation on September 10, 2014 involved the exercise of discretion. There is no dispute Duellman's goal was to avoid having wastewater back up into homes *and* to avoid pumping untreated wastewater into the river. (R. 28, p. 15). In balancing the interests underlying those

goals and in determining whether the Village was able to achieve both, Duellman evaluated numerous factors, including the level of the wastewater in the Main Lift Station tank, whether the water was still rising and if so, at what rate, whether it was still raining and if so, at what rate, how much wastewater pump trucks could remove, etc. (R. 22, p. 6).

Duellman may have misjudged the situation and been negligent in not pumping untreated wastewater into the river sooner, but he and the Village are not liable for that negligence because they are entitled to immunity under Wis. Stat. § 893.80(4). Duellman's handling of the high water situation was a discretionary act, and the Village Board's decision to leave the handling of such situations to the employee certified to operate the System was itself a discretionary act. City of Milwaukee, 277 Wis.2d 635 at ¶ 54. Danen's unwritten "rule of thumb" did not remove any of that discretion because *it was not even binding on Duellman and Smith*.

Accordingly, this court should affirm the court of appeals' determination that Pinter's claims grounded on the allegedly negligent failure to pump untreated wastewater into

the river sooner fail as a matter law because the Village is entitled to immunity under Wis. Stat. § 893.80(4).

B. Even if the "policy" was binding on Duellman and Smith, an unwritten policy like the one alleged in this case cannot impose a ministerial duty.

Pinter argues:

> "The Village policy regarding bypassing the main lift station is shown in the deposition testimony of the Village's president and its two employees. The policy was definite and certain in requiring employees to bring out a portable pump and start pumping when sewage reached the fourth rung of the main lift station...Under the Village's policy there was nothing remaining for judgment or discretion. This policy creates a specific time (when sewage is at the fourth rung), a specific mode (use a portable pump to bypass) and an occasion (high sewage), for the ministerial duty to be triggered." (Pinter Brief, p. 14).

In reality, Duellman, Smith and the Village Board President, Gregory Brunner, all had different understandings of Danen's "rule of thumb," which is not surprising given that neither Danen nor anyone else ever wrote the rule down. Duellman's understanding came from conversations with Danen when their employments overlapped. (R. 22, p. 6). Smith's understanding came from conversations with Duellman. (R. 24, p. 21). Brunner's understanding came from conversations with Danen when Brunner was a Village Board member and Danen was a public works employee. (R. 24, p. 27). There is nothing

in the record to indicate when, where or why any of the conversations occurred.

Duellman clearly understood Danen's "rule of thumb" as requiring the exercise of discretion in deciding when to pump and whether to pump to a transport truck or directly into the river. He testified:

> Q. Okay. And do you use these rungs as a guide at all, or did you use the rungs as a guide at all, when you worked for the Village?
>
> A. When I worked with Mike, I did use them as a guide.
>
> Q. Describe that to me.
>
> A. He basically told me, he says, well, if you see this many rungs going down, you're getting close where you might have to start bypassing.
>
> Q. Okay. So correct me if I'm wrong. So the water's getting higher, and you're seeing less rungs?
>
> A. Exactly.
>
> Q. And that would be a way to determine if you needed to bypass?
>
> A. An indication that tells you, yep, you better get prepared for it because if it doesn't -- if the -- if the liquid level doesn't keep coming down and keeps accumulating, it's going to -- you're just backing everything up.
>
> Q. Okay. The -- and there was a certain level of -- by virtue of looking at the rungs, that you would get ready to bypass?
>
> A. Yes.

Q. And what was that?

A. I believe it was four.

Q. Okay. And just so I'm clear, would that be four rungs still visible?

A. Yes.

***

Q. And at -- when would you decide to start the pump? At a certain rung?

A. Start the pump -- if we seen the level in the lift station, the wet-well lift station, coming up yet, then we'd fire it up and get it ready to go.

Q. Okay. When would you start it? When would you start pumping?

A. It depends on -- if it's still raining out, if the level in the lift station is still coming up, you know, you got to get going on it.

(R. 22, p. 6).

Smith understood Danen's "rule of thumb" to be pump into the river if the wastewater reached the fourth rung, but he also acknowledged there were circumstances where it was appropriate to instead use pump trucks to haul excess wastewater to the treatment plant. (R. 28, p. 15). In fact, he testified that was the preferred course of action so long as the trucks were able to "keep up." (R. 28, p. 15). As for Brunner, he testified:

Q. Do you know what the policy was for putting the pump in place and pumping the pump before your discussion with Mr. Smith (in October 2014)?

A. I – the protocol before that was when it got to the fourth rung, then they would bring out the pump to get ready to pump.

Q. And how do you know that?

***

A. From talking with Mr. Danen at the time he – when he was the man in charge of the sewer.

***

Q. And when would they start pumping?

A. After they got it in place.

Q. And the pumping we're talking about, is that pumping into a septic hauler or pumping into the ditch, or what is the pumping?

A. It would be pumping into the ditch.

(R. 24, p. 27).

Brunner was not asked whether Danen had communicated his "rule of thumb" to other Village Board members. He was not asked what standard was followed by the operator who preceded Danen as "the man in charge of the sewer." He was not asked whether or how Danen's rule applied if the wastewater "got to the fourth rung" *but was no longer rising*. He was not asked whether or when Danen's rule required or allowed using pump trucks rather than pumping

directly into the river. He was not asked whether he believed Duellman was required to follow Danen's rule on September 10, 2014 or what any such belief would have been based on.

Thus, the three witnesses who testified regarding Danen's "rule of thumb" all had different understandings of the rule and its role in dealing with high water situations. Duellman, the employee actually responsible for dealing with the high water situation on September 10, 2014, clearly understood the rule as merely a "guide." (R. 22, p. 6). Of course, if it was just a "guide," it could not have imposed a ministerial duty. Lister, 72 Wis.2d at 301.

Pinter contends a jury can sort out the testimony and decide what the "rule of thumb" really required/allowed on September 10, 2014. (Pinter Brief, p. 15). But that raises a question – whose understanding of the rule was binding on Duellman and Smith on September 10, 2014? Duellman's? Brunner's? The Village Board's? Danen's? Pinter does not say.

The court of appeals correctly recognized that an oral policy alleged to create a ministerial duty is fundamentally

different than a statute, administrative rule or written policy. Courts can determine the meaning of the latter from the written language of the statute, rule or policy. In most cases, including this one, courts cannot do the same with an alleged oral policy. The court of appeals held:

> "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." Pinter, 382 Wis.2d 272 at ¶ 23.

This court should affirm that reasoning, even if it concludes Danen's "rule of thumb" was somehow binding on Duellman and Smith on September 10, 2014. To do otherwise would fundamentally alter the ministerial duty analysis Wisconsin courts have applied for the past 40+ years. Lister, 72 Wis.2d at 301.

Pinter cites numerous foreign cases to support his contention that an oral policy can create a ministerial duty.

(Pinter Brief, pp. 16-19). Most of the cases address whether a particular oral policy is enforceable or constitutional. Those cases do nothing to help this court determine whether, under Wisconsin law, Danen's "rule of thumb" imposed a ministerial duty on Duellman and Smith.

The two cases that are even remotely apposite are Thomas v. County Commissioners, 293 Kan. 208, 262 P.3d 336 (2011) and Yanero v. Davis, 65 S.W.3d 510 (Ky. 2001). They at least involve some form of municipal immunity. They also mention oral policies. But neither case discusses if, how, why and/or under what circumstances an oral policy can impose a ministerial duty. Thomas, 262 P.3d at 352-55; Yanero, 65 S.W.3d at 529. The cases thus do very little to help Pinter or this court.[3]

[3]Pinter alleges the Village, after previous backups, had promised him and the previous owner of his home that it would adopt or follow a procedure to prevent future backups. (Pinter Brief, p. 4). He has never claimed those alleged promises imposed a ministerial duty on the Village. Further, this court has held that such promises do *not* impose a ministerial duty on the promisor. Barillari v. Milwaukee, 194 Wis. 2d 247, 251-52, 533 N.W.2d 759 (1995); Bicknese v. Sutula, 2003 WI 31, ¶ 24, 260 Wis. 2d 713, 660 N.W.2d 289.

II. To Prevail on His Private Nuisance Claim Based on the Village's Allegedly Negligent Maintenance of the System, Pinter Had to Prove the Village's Maintenance of the System Was Negligent and That the Negligence Was a Cause of the September 10, 2014 Backup.

Understanding what Pinter must prove to prevail on his private nuisance claim requires understanding the court of appeals' decision in Menick v. City of Menasha, 200 Wis.2d 737, 547 N.W.2d 778 (Ct. App. 1996) and this court's decision in City of Milwaukee.

In Menick, the plaintiff's basement was flooded with wastewater on two occasions when the City of Menasha's wastewater system backed up during heavy rains. 200 Wis.2d at 741-42. She asserted a private nuisance claim against the city. Id. at 741. The court of appeals agreed the flooding constituted an invasion of Menick's property but concluded Menick also needed to prove: 1) that the invasion was intentional and unreasonable; or 2) that the invasion was unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultra-hazardous conduct. Id. at 747.

The court concluded there was no evidence the city intentionally flooded Menick's home and no evidence that the city engaged in reckless or ultra-hazardous conduct. Id. Accordingly, for Menick to prevail, she needed to prove the city was negligent and that its negligence was a cause of the backup. Id. at 747-48. The court held:

> "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 of negligent actions on the part of the City...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...(A) jury could properly infer that the heavy rains alone resulted in an overload of the system...(Menick) has failed to offer any substantiated theories of negligence implicating the actions of the City." Id. at 748-49 (emphasis in original).

The facts in this case are nearly identical to the facts in Menick, and the court's analysis of Menick's private nuisance claim applies with equal force in this case, at least with regard to Pinter's nuisance claim based on the City's allegedly negligent maintenance of the System. To prevail on that claim, Pinter must prove the City was negligent in maintaining the System and that such negligence was a cause of the September 10, 2014 backup. Id. Just like Menick, he has not even

attempted to prove that sort of causal negligence, as explained in Section III below.

In 2005, this court decided City of Milwaukee. The case involved a city water main that had been leaking for some time. 277 Wis.2d 635 at ¶ 11. The parties disputed whether the city should have known about the leak. Id. at ¶ 21. Eventually, the water main broke and caused damage to a sewer owned and operated by the plaintiff, the Milwaukee Metropolitan Sewerage District ("MMSD"). Id. at ¶ 11. MMSD asserted both negligence and private nuisance claims. Id. at ¶ 3. The city argued it was immune from both. Id. at ¶ 4.

This court began by explaining the difference between public and private nuisances. Id. at ¶ 24-31. It concluded the water from the city's broken water main did invade MMSD's property and was a private nuisance. Id. at ¶ 31. It then explained at length the elements a plaintiff must prove to prevail on a private nuisance claim. Id. at ¶ 32-49. In doing so, it relied on the Restatement (Second) of Torts, which provides in relevant part:

> 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) intentional and unreasonable, or
>
> b) unintentional and otherwise actionable under the rules controlling liability for negligent conduct

Id. at ¶ 32.

The court explained:

> "Therefore, after it is established that a nuisance exists the next step in a nuisance analysis is determining whether there is any liability-forming conduct. Proof of the underlying tortious conduct is an essential element in a nuisance analysis." Id.

The court examined what it means for an invasion of land to be "intentional." Id. at ¶ 37-38. It concluded the invasion at issue was not intentional. Id. at ¶ 39. It then considered what a plaintiff must prove to prevail on a private nuisance claim grounded in negligence. Id. at ¶ 42-49. In doing so, it first recognized that Wisconsin law on the subject had been less than clear:

> "(T)he failure to distinguish between a nuisance and the wrongful conduct necessary to establish liability for the nuisance has resulted in much confusion the area of nuisance law. In particular, there has been much confusion surrounding the relationship between nuisance and negligence." Id. at ¶ 42

The court attempted to resolve the confusion:

> "(A)n essential element of a private nuisance claim grounded in negligence is proof that the underlying conduct is 'otherwise actionable under the rules controlling liability for negligent ... conduct.' Restatement (Second) of Torts § 822. *See also Fortier v. Flambeau Plastics Co.*, 164 Wis.2d 639, 676, 476 N.W.2d 593 (Ct.App.1991) (plaintiff's claim for private nuisance could proceed to the extent it was based on common-law negligence). A corollary to this principle is that when a nuisance is grounded solely on negligent acts, there is no need to separately analyze a cause of action for negligence and nuisance because the negligence is but the tortious conduct upon which liability for the result–the nuisance–depends. Where an alleged nuisance is not based upon intentional conduct, '[i]t necessarily follows that if there was no negligence there was no nuisance.' *Lange v. Town of Norway*, 77 Wis.2d 313, 321, 253 N.W.2d 240 (1977) (quoting *Raisanen v. City of Milwaukee*, 35 Wis.2d 504, 514-15, 151 N.W.2d 129 (1967)). Thus, when the plaintiff's complaint does not allege intentional conduct and negligence is not properly proved, the '[p]laintiff add[s] nothing to the sufficiency of the complaint by his allegations of nuisance.' *Id.* (quoting *Raisanen*, 35 Wis.2d at 514, 151 N.W.2d 129). *See Also Bratonja v. City of Milwaukee*, 3 Wis.2d 120, 126-27, 87 N.W.2d 775 (1958) (ruling that where cause of action is predicated upon negligent conduct 'the designation 'nuisance' is a mere label, adding nothing to the case asserted on the basis of negligence')." Id. at ¶ 44.

Thus, for MMSD to prevail on its private nuisance claim, it needed to first establish an invasion or interference with the private use of its property, which it did. Id. at ¶ 26. It then needed to prove that "the conduct causing the harm is actionable under the rules governing liability for negligent conduct." Id. at ¶ 49. With those elements of the private nuisance claim in mind, the court considered under what circumstances, if any, the

city would be immune from a private nuisance claim grounded on negligence. Id. at ¶ 50-62. It held:

> "[I]t is clear that under the law since *Holytz* and the enactment of the immunity statute that a municipality *may* be liable for a nuisance founded upon negligent acts. *Lange*, 77 Wis.2d at 320, 253 N.W.2d 240. Whether immunity exists for nuisance founded on negligence depends upon the character of the negligent acts. If the acts complained of are legislative, quasi-legislative, judicial, or quasi-judicial–that is discretionary–the municipality is protected by immunity under § 893.80(4). *Lodl*, 253 Wis.2d 323, ¶ 21, 646 N.W.2d 314; *Allstate*, 80 Wis.2d at 18, 258 N.W.2d 148; *Lange*, 77 Wis.2d at 318, 253 N.W.2d 240. Conversely, immunity does not apply if the negligence involves an act performed pursuant to a ministerial duty. *Willow Creek*, 235 Wis.2d 409, ¶ 27, 611 N.W.2d 693; *Allstate*, 80 Wis.2d at 16-17, 258 N.W.2d 148. Thus, when analyzing claims of immunity under § 893.80(4) for nuisances, the proper inquiry is to examine the character of the underlying tortious acts. Finally, when a nuisance is grounded solely upon negligent acts, there is no need to separately analyze the immunity question for both negligence and nuisance because liability for the nuisance cannot be established without proof of negligence. *Lange*, 77 Wis.2d at 321, 253 N.W.2d 240 (citing *Raisanen*, 35 Wis.2d at 514-15, 151 N.W.2d 129)."[4] Id. at ¶ 59 (emphasis in original).

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[4]As a footnote to this holding, the court explained there were at least four earlier court of appeals decisions, including Menick, that considered how immunity under Wis. Stat. § 893.80(4) applied to "nuisance claims involving sanitary and storm sewers." Id. at ¶ 59, n.17. It noted those cases "utilized conflicting rationales to reach results that are not entirely consistent." Id. It concluded the confusion stemmed from three factors: 1) some decisions relied on immunity jurisprudence that predated Wis. Stat. § 893.80(4); 2) some decisions employed separate analyses for negligence and nuisance grounded on negligence; and 3) some decision failed to stress that a municipality is liable for its negligent acts only if those acts are performed pursuant to a ministerial duty. Id. The court did *not* cite Menick as being a case where one or more of those errors occurred. Id.

The court then applied its immunity holding to the facts of the case. Id. at ¶ 60-62. It concluded the city was immune from suit for its decisions regarding the design and continued existence of the waterworks system, even if the design (or a failure to redesign) was negligent and created a nuisance, because the design of the system was a discretionary, legislative function. Id. at ¶ 60. On the other hand, the city was *not* immune from claims that its negligence in maintaining the system had created a nuisance because once the system was designed and constructed, the city had a ministerial duty to properly maintain it. Id. at ¶ 62, 91.

The only negligent maintenance MMSD alleged was a failure to repair the leaking water main before it broke. Id. at ¶ 61. The court concluded there was a material issue of fact as to whether the city had constructive notice of the leak prior to the break. Id. at ¶ 62. If the city had such notice and a reasonable waterworks operator would have repaired the leak, the city breached a ministerial duty to properly maintain the waterworks system and was thus negligent and not entitled to immunity. Id. at ¶ 62, 91. On the other hand, if the city did not

have actual or constructive notice, it could not be negligent in failing to repair the water main. Id. at ¶ 62, 91.

Before applying City of Milwaukee's teachings to this case, it is necessary to consider this court's decision in Bostco v. Milwaukee Metro. Sewerage Dist., 2013 WI 78, 350 Wis.2d 554, 835 N.W.2d 160. Pinter argues the case created a "nuisance exception" to Wis. Stat. § 893.80(4). (Pinter Brief, p. 23). Two dissenting justices argued the case significantly modified City of Milwaukee. 350 Wis.2d 554 at ¶ 139-40, 149 (J. Abrahamson, dissenting). In reality, it did neither.

MMSD was the defendant in Bostco. Id. at ¶ 12. It owned and operated a large sewerage tunnel ("the Deep Tunnel") that ran near Bostco's property. Id. at ¶ 10-11. MMSD's "operation and maintenance of the Deep Tunnel" caused a drawdown of the water table beneath Bostco's property. Id. at ¶ 12. The drawdown caused the deterioration of wood pilings that supported Bostco's building. Id. The building suffered substantial structural damage as a result of the deterioration. Id.

Bostco asserted negligence and private nuisance claims. Id. at ¶ 13. The claims were tried to a jury. Id. The jury "found that MMSD was negligent in its maintenance of the Deep Tunnel near Bostco's building and that MMSD's negligence was a cause of Bostco's injury." Id. at ¶ 14. This court concluded that, under City of Milwaukee, that is *exactly* the sort of negligence for which a municipality is not immune because once a municipality designs and constructs a waterworks or wastewater system, it has a ministerial duty to properly maintain the system. Id. at ¶ 3, 41.

In doing so, the court reaffirmed that liability for a private nuisance requires there be underlying tortious conduct, typically either unreasonable intentional conduct or actionable negligent conduct. Id. at ¶ 31. Bostco proved that underlying tortious conduct by convincing the jury MMSD "was negligent in its maintenance of the Deep Tunnel...and that MMSD's negligence was a cause of Bostco's injury." Id. at ¶ 14, 43.

Bostco's private nuisance claim was analogous to MMSD's private nuisance claim in City of Milwaukee and to Pinter's private nuisance claim grounded on allegedly negligent

maintenance in this case. Bostco alleged MMSD negligently maintained the Deep Tunnel resulting in damage to Bostco's property. Id. at ¶ 14. In City of Milwaukee, MMSD alleged the city negligently maintained its water main resulting in the break and damage to MMSD's property. 277 Wis.2d 635 at ¶ 7. Pinter alleges the Village negligently maintained the System resulting in the November 10, 2014 backup. (R. 16, pp. 2-3). None of the three defendants were entitled to immunity from the negligent maintenance claims. Bostco, 350 Wis.2d 554, ¶ 3-4; City of Milwaukee, 277 Wis.2d 635 at ¶ 7-9; Pinter, 382 Wis.2d 272 at ¶ 39.

The critical difference between the three cases is a *factual* one. Bostco proved its negligent maintenance claim. Bostco, 350 Wis.2d 554 at ¶ 14. In City of Milwaukee, MMSD had enough evidence to get its negligent maintenance claim to a jury. 277 Wis.2d 635 at ¶ 62, 72, 91. Pinter has *no evidence* of negligent maintenance or of the requisite causal connection between such negligence and his damages, as demonstrated below. Those differences in the nature and quality of the plaintiffs' negligence evidence is why Bostco prevailed, why

MMSD got a chance to prevail at trial and why Pinter's claim was properly dismissed on summary judgment.

City of Milwaukee dictates three important results in this case. First, it dictates that the Village is entitled to immunity on Pinter's private nuisance claim grounded on the Village's alleged negligence in failing to pump untreated wastewater into the river sooner. 277 Wis.2d 635 at ¶ 59 ("whether immunity exists for nuisance founded on negligence depends upon the character of the negligent acts. If the acts complained of are ... discretionary, the municipality is protected by immunity under § 893.80(4).") As explained in Section I above, the decisions made during the high water situation were discretionary. Accordingly, the Village is entitled to immunity from a negligence or private nuisance claim based on those decisions, even if the decisions were negligent and the cause of an invasion of Pinter's property. Id.

Second, City of Milwaukee dictates that the Village is *not* immune from Pinter's private nuisance claim grounded on the Village's alleged negligence in maintaining the System. Id. at ¶ 62, 91. That is because once the Village opted to design, build

and operate a wastewater treatment system, it was subject to a ministerial duty to properly maintain the system. Id. at ¶ 60-62. If it was negligent in maintaining the system and its negligence was a cause of the September 10, 2014 backup, Pinter would prevail on his nuisance claim. Id.

Third, City of Milwaukee dictates that Pinter's private nuisance claim grounded on the Village's alleged negligence in maintaining the System is indistinguishable from his ordinary negligence claim grounded on the same alleged negligence. Id. at ¶ 44 ("when a nuisance is grounded solely on negligent acts, there is no need to separately analyze a cause of action for negligence and nuisance because negligence is but the tortious conduct upon which liability for the result–the nuisance–depends"). There is thus no need to analyze the two claims separately. Id.

The three results dictated by City of Milwaukee, along with the fact that the Village's decisions regarding the handling of the high water situation were discretionary, leave only a few questions to be resolved. Those questions include: 1) with regard to his negligence and private nuisance claims based on

allegedly negligent maintenance of the System, what evidence must Pinter put forth to prove causal negligence?; and 2) if expert testimony is required, why is it required and what must be included in the expert's testimony?

Menick provides valuable guidance. It instructs Pinter must prove the Village was negligent in maintaining the System and must prove the Village's negligence was a cause of the September 10, 2014 backup. Menick, 200 Wis.2d at 748-49. That is consistent with this court's oft-repeated recitation of the four elements a plaintiff must prove to prevail on a negligence claim: 1) the existence of a duty of care on behalf of the defendant; 2) a breach of that duty; 3) a causal connection between the breach and the plaintiff's injury; and 4) actual damages resulting from the breach. Gritzner v. Michael R., 2000 WI 68, ¶ 19, 235 Wis. 2d 781, 611 N.W.2d 906. The Village had a duty of care – its duty to properly maintain the System – and Pinter suffered actual damages as a result of the backup. Thus, Pinter is left to prove the two middle elements – that the Village breached its duty to properly maintain the

System and a causal connection between the breach and his damages.

Expert testimony is required to prove negligent maintenance of the System and the requisite causal connection to the September 10, 2014 backup. The requirement of expert testimony is an extraordinary one. Racine County, 323 Wis.2d 628 at ¶ 28. However, expert testimony is required when the matter at issue "is not within the realm of ordinary experience and lay comprehension." White v. Leeder, 149 Wis.2d 948, 960, 440 N.W.2d 557 (1989); Cramer v. Theda Clark Mem'l Hospital, 45 Wis.2d 147, 150, 152, 172 N.W.2d 427 (1969). In such cases, a lack of expert testimony constitutes an "insufficiency of proof." Cramer, 45 Wis.2d at 152.

To prove the Village was negligent in its maintenance of the System, Pinter must show what standards of care apply to the operation and maintenance of a wastewater system like the one the Village owns and operates. To do so, there must be evidence as to how much water such a system is expected to take on during heavy rains, what the municipality should do if the system is taking on more water than expected, when and

how the municipality should inspect the pipes making up the system, when and how the municipality should replace pipes, etc. Knowing what is required to properly maintain a municipal wastewater system is not something that is "within the realm of ordinary experience and lay comprehension." White, 149 Wis.2d at 960. Without the aid of expert testimony, a lay juror would have no way to evaluate whether the Village was or was not maintaining the System in a reasonable manner.

City of Milwaukee is again instructive. In its effort to prove the city was negligent in not repairing the leaking water main before it broke, MMSD argued the city had constructive notice of the leak because it should have been doing testing that would have revealed the leak. City of Milwaukee, 277 Wis.2d 635 at ¶ 78. This court concluded expert testimony was required to prove what testing a reasonable waterworks operator should be doing:

> "(T)here is an utter lack of testimony in the record concerning the appropriate standard of care for a waterworks operator and whether this standard includes periodic pressure testing...There are simply no depositions, affidavits, or other testimony in the record that establish that the exercise of reasonable care for a waterworks operator includes periodic pressure testing of water mains...MMSD has put forth no evidence as to whether other municipalities regularly pressure test their pipes, the cost of such testing, the dangers involved, whether such

> testing is commonplace, and whether such testing would require extended loss of service to customers. Such matters are obviously beyond lay comprehension such that expert testimony would be required to establish that periodic pressure testing is feasible and part of the exercise of ordinary care for reasonable waterworks operator." Id. at ¶ 80-81.

The exact same analysis applies in this case. It applies to proving the standard of care for a reasonable wastewater system operator, as noted above, and to proving a causal connection between any negligence and the September 10, 2014 backup. Even assuming Pinter proved the Village's maintenance fell below the standard of care, how would a lay juror, without the aid of expert testimony, evaluate whether proper maintenance would have prevented the September 10, 2014 backup? The juror could only speculate because the effect of any maintenance failure is another matter that is "obviously beyond lay comprehension." Id. at ¶ 81.

This court should find that to prevail on his private nuisance claim based on the Village's allegedly negligent maintenance of the System, Pinter had to prove the Village's maintenance of the System was negligent and that the negligence was a cause of the September 10, 2014 backup. It should further find that proving those elements requires expert

testimony regarding the operation, maintenance and functioning of the System.[5]

III. The Evidence and the Inferences from That Evidence in the Summary Judgment Record Are Not Sufficient to Create a Genuine Issue of Material Fact Regarding Pinter's Private Nuisance Claim Grounded on the Village's Allegedly Negligent Maintenance of the System.

Pinter lacks the required expert testimony for the reasons noted in Section II above. That results in an "insufficiency of proof" that dooms his claims grounded on the Village's allegedly negligent maintenance of the System. City of Milwaukee, 277 Wis.2d 635 at ¶ 80-81; Cramer, 45 Wis.2d at 152. The analysis need go no further. Nevertheless, the Village will briefly explain why the evidence Pinter cites in lieu of expert testimony is insufficient to support his claims.

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[5]Pinter concedes he needs to prove the Village was causally negligent to prevail on his private nuisance claim. (Pinter Brief, pp. 23-31). He simply argues he does not need expert testimony to prove that negligence. If Pinter did *not* need to prove causal negligence to prevail on his nuisance claim, municipalities that operate wastewater or waterworks systems would be subject to strict liability. That result would be fundamentally inconsistent with Menick, City of Milwaukee, Bostco and with the comments to the Restatement (Second) of Torts § 822, a provision this court has identified as an accurate statement of Wisconsin nuisance law. The result would also raise numerous questions, including whether contributory negligence would be a defense and, if so, how it would apply, and how the damage and notice provisions in Wis. Stat. § 893.80 would apply.

Pinter puts great weight on the fact that heavy rain has been infiltrating and sometimes overwhelming the System since at least 1977. (Pinter Brief, pp. 25, 27). The problem is Pinter has no evidence that suggests the infiltration that occurred before September 10, 2014 would lead a reasonable wastewater system operator to engage in maintenance different from or beyond what the Village has done.[6]

Menick recognized rainwater can infiltrate a wastewater system even if the system is properly maintained. 200 Wis.2d at 749 ("(A) jury could properly infer that the heavy rains alone resulted in an overload of the system ... (Menick) has failed to offer any substantiated theories of negligence implicating the actions of the City."). The DNR also recognizes as much. It has adopted regulations for dealing with high water situations (none of which Pinter alleges imposed a ministerial duty that was violated in this case). Wis. Adm. Code §§ NR 210.21(1)(c) and

[6]Pinter did little to discover what routine and non-routine maintenance of the System had actually been done prior to September 10, 2014. The record, however, does reveal the Village replaced many pipes in 2010. (R. 22, p. 9). The Village periodically uses cameras to look for damaged pipes. (R. 24, p. 24). Since 2010, the Village has been checking for homes that have sump pumps set up to discharge into the wastewater system. (R. 22, p. 9); (R. 24, p. 24). When that sort of "cross connection" is discovered, the Village orders it be disconnected and checks back to see that it has been. (R. 24, p. 24).

§ 205.07(1)(u)3. Those regulations are only necessary because the DNR recognizes rainwater routinely infiltrates wastewater systems, and heavy rains can overwhelm such systems.

There certainly may be a point where rainwater infiltrates a wastewater system to an extent that would lead a reasonable operator to conduct non-routine inspection or maintenance. But determining where that point lies is beyond lay comprehension, as is knowing what inspection or maintenance would be required once the point is reached. City of Milwaukee, 277 Wis.2d 635 at ¶ 80-82.

Pinter also puts great weight on testimony in which Duellman speculates that damaged pipes are a significant source of water infiltration. (Pinter Brief, p. 27). Duellman testified:

> "As you leave Stetsonville coming toward Medford, there is a (sewer) line in there – I believe it's an eight-inch line that goes up to the hill north of town – and we believe that's where a lot of infiltration is coming from." (R. 24, p. 17).

There are two problems with Pinter's reliance on this testimony. First, while Duellman was in charge of *operating* the System, there is no evidence he played any role in inspecting or performing non-routine maintenance on the System or that he is in any way qualified to give opinions regarding the source of

water infiltration. In fact, there is nothing to even *suggest* Duellman is trained as an engineer or is otherwise competent to give expert engineering testimony.

The second problem with Pinter's reliance on Duellman's speculation is that even if the pipes are damaged, there is still the question of how a reasonable wastewater system operator would deal with the damage. That decision would likely depend on the extent of damage, the effect it was having on the system, the location of the pipe, the cost of potential repairs, etc. Showing what a reasonable operator would do requires expert testimony. City of Milwaukee, 277 Wis.2d 635 at ¶ 80-82.

Pinter also ignores evidence in the record that suggests the System is *not* in need of repair. Pinter concedes backups are rare. (Pinter Brief, p. 4) (noting four backups since 1977). He concedes that, in at least most high water situations, the System can be operated in a way that prevents backups – wastewater simply needs to be pumped out of the Main Lift Station tank before the System gets overwhelmed. (Pinter Brief, p. 5). There is no evidence of any other problems with the System.

Pinter bears the burden to prove the Village was negligent in its maintenance of the System and that its negligence was a cause of the September 10, 2014 backup. Expert testimony is required to meet those burdens. City of Milwaukee, 277 Wis.2d 635 at ¶ 80-82. In the absence of that testimony, there is not sufficient evidence to support Pinter's claims.

CONCLUSION

Pinter's negligence and nuisance claims based on the Village's alleged negligence in not pumping untreated wastewater into the river sooner fail as a matter of law because the Village is entitled to immunity under Wis. Stat. § 893.80(4). City of Milwaukee, 277 Wis.2d 635 at ¶ 59. Duellman's and Smith's decisions regarding how to handle the high water situation on September 10, 2014 were discretionary. They required weighing numerous factors, including DNR regulations that permit pumping untreated wastewater into a public waterway only when there is "no feasible alternative," the level of the water in the lift station tanks, whether the water was rising and, if so, at what rate, whether it was still raining and, if so, at what rate, the volume of water that could be removed using pump trucks, etc. (R. 22, p. 6); (R. 28, p. 15).

Danen's "rule of thumb" did not eliminate Duellman's and Smith's discretion because it was not binding on them. But even if it was binding, an alleged oral policy is fundamentally different than a statute, administrative code provision or written policy because courts cannot look at the language of the oral

policy to determine what it means and if it truly imposes an "absolute, certain and imperative" duty. Lister, 72 Wis.2d at 301.

This case demonstrates the problems with relying on an alleged oral policy to create a ministerial duty. There is nothing in the record to show when or how Danen developed his "rule of thumb." There is no evidence the Village Board ever adopted the rule. There is no evidence as to when or why Danen communicated the rule to Duellman. All three witnesses who testified regarding the rule had a different understanding of what it required/allowed. Under those circumstances, the court cannot find the "rule of thumb" imposed a ministerial duty on Duellman and Smith, as the court of appeals correctly concluded. Pinter, 382 Wis.2d 272 at ¶ 23.

Pinter's negligence and nuisance claims based on the Village's alleged negligence in failing to replace damaged pipes or in otherwise failing to properly maintain the System fail as a matter of law for a different reason. To prevail on those claims, Pinter would have to prove: 1) the Village was negligent in maintaining the System; and 2) the negligence was a cause of

the September 10, 2014 backup. Expert testimony is required to prove both negligence and cause. City of Milwaukee, 277 Wis.2d 635 at ¶ 80-81.

The standard of care for inspecting and maintaining a wastewater system like the one at issue is "obviously beyond lay comprehension." Id. at ¶ 81. So is determining the effect that any negligent maintenance had on the System on September 10, 2014. Id. Perhaps a reasonable wastewater system operator would have done additional inspection or maintenance and perhaps that additional work would have prevented the September 10, 2014 backup. Or perhaps not. There is no way to know without evidence of the standard of care for maintaining a wastewater system like the one at issue. Pinter has no such evidence and thus cannot prove causal negligence.

For all of the reasons set forth above, the Village respectfully requests the court affirm the court of appeals decision.

Dated this 24th day of October, 2018

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By: /s/

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced using the following font:

> Proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body test, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body test. The length of this brief is 10,067 words.

Dated this 24th day of October, 2018.

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CERTIFICATE OF SERVICE

I certify, pursuant to Wis. Stats. §§ 809.80 and 809.18, that the Brief of Defendant-Respondent Village of Stetsonville, was sent by U.S. mail on October 24, 2018, to the Clerk of the Wisconsin Supreme Court, with three (3) copies served on the parties as follows:

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 24th day of October, 2018.

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State of Wisconsin

IN SUPREME COURT

ALAN W. PINTER,
Plaintiff - Appellant - Petitioner,

v.

VILLAGE OF STETSONVILLE,
Defendant - Respondent.

PLAINTIFF - APPELLANT - PETITIONER'S REPLY BRIEF

On Petition for Review from the
Wisconsin Court of Appeals District III

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"The King can do no wrong, but his ministers may."

Hugh Douglas Price and J. Allen Smith, *Municipal Tort Liability: A Continuing Enigma*, 6 U. FLA. L. REV. 330, 334 (1953) (quoting *Ballard v. Tampa*, 124 Fla. 457, 168 So. 654, 657 (1936)); as quoted in *Kemps v. Hill*, 187 Wis. 2d 508, 523, 523 N.W.2d 281, 289 (Ct. App. 1994) (Sundby dissenting)

ARGUMENT

I. INTRODUCTION

The Plaintiff-Appellant-Petitioner, Alan W. Pinter (hereinafter "Alan") submits this brief in reply to the "Brief of Defendant-Respondent Village of Stetsonville" (hereinafter "Village Brief").

In its brief, the Defendant-Respondent, Village of Stetsonville (hereinafter "Village"), misconstrues the facts before this Court and relies upon the improper innuendo its misconstruction creates.

In addition, the Village's Brief creates a new soundbite as to the Village's policy concerning the pumping of the main lift station. The reason for the new soundbite is a mystery, except insofar as it is an apparent attempt to demean the significance of the Village's oral policy. The Village further argues that the Village's pumping policy was not binding on the Village's employees as it was created by a prior employee. Additionally, the Village continues its argument that an oral policy simply cannot create a ministerial duty.

The Village's nuisance argument simply ignores the fact that it has admitted all of the facts necessary to prove the causation element of negligence to support a nuisance action.

II. THE FACTS PROPOUNDED BY THE VILLAGE

As anticipated by Alan in his brief, the Village continues its soundbite: "rule of thumb." The use of the term "rule of thumb" is addressed in Alan's brief (Plaintiff-Appellant-Petitioner's Brief and Appendix, pages 21-22) (hereinafter "Alan's Brief"). The Village, not to be dissuaded by Alan's arguments, embellishes its original soundbite and creates a new soundbite: "Danen's rule of thumb." Use of this new soundbite is an attempt, directly or subjectively, to diminish the importance and viability of the Village's oral pumping policy. The vernacular used to label the policy is of no consequence. This Court should reject the attempt by the Village to diminish its policy by name calling.

Furthermore, nowhere in the record is the policy called "Danen's rule of thumb." The term was created by the Village, or its attorney, in its brief. Indeed, the testimony shows the policy was created by Mike Danen, the Village's former public works director. That policy, at the time of the fecal invasion into Alan's basement, was that the Village would manually pump out the main lift station to the ditch when the sewage reached the fourth rung of the main lift station. In fact, both Chad Smith and Greg Brunner, the Village president, call the fourth rung policy a "policy" or a "protocol"[1] without using the

[1] A "protocol" is a "rigid long established code prescribing complete deference to superior rank and strict adherence to due order of precedence and precisely correct procedure ..." *Websters New World College Dictionary* (4th Ed. 2016)

term "rule of thumb" and certainly without using the words, "Danen's rule of thumb." (R. 24, ¶ 4, Smith Deposition, page 48, line 16 to page 49, line 19; ¶ 5, Brunner Deposition, p. 28, line 10 to p. 19, line 15) Regardless of the nomenclature, a policy is a policy.

It is important for this Court to recognize that the Village Brief puts forth an incomplete timeline concerning when the wastewater in the main lift system reached the fourth rung (triggering the Village's duty to pump into the ditch) and when the pumping into the tanker truck was attempted. The innuendo is that the Village attempted to use the tanker truck before the wastewater reached the critical fourth rung of the main lift station and that there was some sort of discretion under the Village's policy when the fourth rung was reached. The following recitation accurately reflects the timeline concerning the wastewater hitting the fourth rung and the Village's attempt at using a tanker truck.

On September 10, 2014, Alan woke up and realized that it had been raining all night. He checked the basement and at that time it was dry. Shortly after that his wife went downstairs and heard the pipes gurgling. He then went directly over to the Village garage (the Village garage was practically across the street from Alan's house) and David Duellman was standing by the main lift station. Alan estimates that this conversation with David Duellman took place at 8:30 a.m. (R. 24, ¶ 2, Pinter Deposition, p. 43, lines 3-5) He indicated to Mr. Duellman that his wife had heard gurgling and asked him if the pit needed to be pumped out. Alan volunteered to help Mr. Duellman get the portable pump out and start pumping into the ditch. Mr. Duellman agreed that the water was

getting high, but replied that he did not want to pump it out because he would then have to fill out papers for the Department of Natural Resources which he did not want to do. (R. 24, ¶ 2, Pinter Deposition, p. 39, line 16 to p. 41, line 25; p. 23, line 3 to p. 44, line 4; p. 47, line 18 to p. 48, line 21)

Alan then went to work. After approximately 10-15 minutes, he received a telephone call from his wife that the basement flooded. He then went back to the main lift station and again discussed the situation with Mr. Duellman and informed him that the basement was flooding. (R. 24, ¶ 2, Pinter Deposition, p. 49, line 11 to p. 51, line 4)

Chad Smith, the other Village employee kept a detailed log of the activities of the events of September 10, 2014. (R. 24, ¶ 4, Smith Deposition, Exhibit 16) As reflected in that log, at 8:40 a.m. David Duellman called Chad Smith to have the tanker truck (which was then pumping at the north lift station) come to the main lift station to pump. At that time, Alan's basement was flooded with sewage and the water was at the second rung of the main lift station. Duellman stated he had never seen it so high. (R. 24, ¶ 5, Brunner Deposition, p. 17, line 16-21; ¶¶ 3 and 4, Duellman Deposition and Smith Deposition, Exhibit 16, Appendix B) Meanwhile Smith had the tanker truck stop pumping at the north lift station. The tanker truck had to dump its load at the treatment plant before going to the main lift station. The tanker truck started pumping at the main lift station at 8:55 a.m. (*Id.*)

The chronology of events demonstrates that before the decision was made to bring the tanker truck to the main lift station, and obviously before the tanker truck started

pumping, that sewage was already infiltrating the Pinter home and that the level at the main lift station was at the second rung. The level was higher than both employees had ever seen it, and well past the point that the Village policy called for pumping the sewage into the ditch.

Troubling is the Village's continual argument that there was some element of discretion in the policy to use the tanker truck before pumping into the ditch when the sewage reached the fourth rung. Nowhere in the testimony of the Village president, Greg Brunner, the Village employee, Chad Smith, nor the Village employee, David Duellman, is there any mention of discretion to use the tanker truck when the sewage at the main lift station reached the fourth rung. As Mr. Duellman states in his testimony, when discussing the sewage at the fourth rung and the water rising: "if you still see it coming up, still raining out, then you know you are accumulating in that lift station, and that lift station cannot keep up." (R. 24, ¶ 3, Duellman Deposition, p. 35, line 25 to p. 36, line 3) As Chad Smith testified upon questioning about the fourth rung policy and whether at the fourth rung the policy was to start pumping or watch and wait to see if the water keeps rising: "Start pumping. If it rises above the - - you know, if it gets above the fourth rung, start pumping ... you know, don't let it anything past the fourth. We can't keep up." (R. 24, ¶ 4, Smith Deposition, p. 49, lines 14-19) The pumping testified by both referred to pumping into the ditch and not into the tanker truck. The Village president testified that at the second rung the Village employees should already be pumping the main lift station into the ditch. (R. 24, ¶ 5, Brunner Deposition, p. 29, lines 11-15). That level was

reached at least by 8:40 a.m. The tanker truck was not used until 8:55 a.m. The main lift station was not pumped into the ditch until 9:45 a.m. (R. 24, ¶¶ 3 and 4, Duellman Deposition and Smith Deposition Exhibit 16)

It is not Alan's intent to try the facts before this Court. He feels that it is important, however, to set forth these detailed facts given the innuendo and incompleteness of the Village's recitation of the facts. At the summary judgment stage of a lawsuit, it would be improper to decide material issues of fact. As to the timeline of events, there are simply no issues of fact, much less material issues of fact.

III. MINISTERIAL DUTY

As to whether the policy of the Village created a ministerial duty that required David Duellman to act to prevent damage to Alan's basement, the Village brings forth two arguments. The first is a new argument that the oral policy is not binding upon David Duellman or Chad Smith as it was created by the former public works director. Secondly, the Village argues that an unwritten policy cannot impose a ministerial duty because the Village president and two Village employees testified differently as to the policy.

As a preface to these arguments, the Village discusses the ministerial duty exception to the immunity of Wis. Stat. § 893.80(4). In doing so, it cites *DeFever v. City of Waukesha*, 2007 Wis. App. 266, 306 Wis. 2d 766, 743 N.W.2d 848 to support the following statement: "An 'act of government' can include statutes, administrative rules, and *written* policies." (Village's Brief, p. 15, emphasis added) The statement is a blatant

attempt at deception. Neither the *DeFever* case, nor the cases it cites, use the terms "written" policies. Indeed, the *DeFever* case quotes *Meyers v. Schultz*, 2004 Wis. App. 234, ¶ 19, 277 Wis. 2d 845, 857, 690 N.W.2d 873, 856, as follows: "... statutes, administrative rules, policies, or orders". The entire passage from *Meyers* is illustrative:

> We conclude that a ministerial duty is one that is imposed by law. "Law" in this context means, at a minimum, an act of government. "Law" includes "statutes, administrative rules, policies, or orders"; ... it includes plans adopted by a governmental unit. ... it includes contracts entered into by a governmental unit.
>
> *Id.* (citations omitted)

There is no prohibition of oral policies. The scope of the definition of what can constitute a ministerial duty surely includes a policy developed by the former public works director of the Village. It is an "act of government" that can, and in this case did, create a ministerial duty.

A. Village employees are required to follow the policies of the Village.

In an argument never raised previously, the Village now argues that Chad Smith and David Duellman were not bound to follow the Village's pumping policy because it was developed by the former public works director.

First, as an argument never raised below, this court should ignore it. *State v. Holland Plastics Co.,* 111 Wis. 2d 497, 504-505, 331 N.W.2d 320, 324 (1983)

Second, the argument is fanciful as the testimony is that the fourth rung policy was the policy **of the Village,** not just its former director of public works. As Chad Smith

testified, the pumping into the ditch when the sewage reached the fourth rung of the main lift station was something that was supposed to be done. (R.24 ¶ 4, Smith Deposition, p. 20, lines 18-19). Again, Chad Smith testified, this policy was taught to David Duellman by the previous director and Duellman then taught it to Smith. (R. 24, ¶ 4, Smith Deposition, p. 20, lines 13-17) It is incorrect to assert that an employee is not bound to follow a policy so developed. The Village cites no evidence in this record to show that the policy did not have to be followed by Chad Smith and David Duellman. It could not, because such evidence does not exist. Further, it cites no law supporting the proposition that a municipal employee is not bound to follow the policies developed by prior employees. Again, such citation is not possible as none exists.

B. The differences in the testimony concerning the oral policy of the Village do not create a material issue of fact and even if the differences did, the issue should be determined by a jury.

The second argument that the Village makes concerning the ministerial duty is one based on its perceived differences between the testimony of Greg Brunner (the Village president), Chad Smith, and David Duellman.[2] Upon reading the testimony of these three individuals (A-App. 127-134), it is difficult to discern perceptible differences. As noted by Alan in his brief, the only difference is that in the testimony of David Duellman was to, at the fourth rung, wait to see if the water kept rising and then to pump, and the testimony of Chad Smith and the Village president who testified that at the fourth rung to

[2] This also is a new argument not previously raised by the Village. *State v. Holland Plastics Co., supra*

get the pump out and start pumping without waiting to see if the water kept rising.

This could be seen as an issue of fact, but it is not a material issue of fact. The facts of the case are that at the fourth rung the water kept rising and under either the policy as testified to by David Duellman or as testified to by Chad Smith and Greg Brunner, the Village should have been pumping at the fourth rung.

In its brief the Village states: "Instead the board left it to the employee certified to operate their system to decide how to handle high water situations." (Village's Brief, p. 17) The record reference to this statement is "R. 24, p. 15". That reference is a reference to portions of five different pages of the deposition testimony of Chad Smith. The only possible reading of that record that could support, remotely, such a statement is David Duellman's deposition testimony about waiting to see if the water kept rising at the fourth rung. The statement that the Village left the primary decision to the employee certified to operate the system is not supported by the record.

Even if there is an issue of fact, material or otherwise, that does not diminish the viability of an oral policy. As noted in Alan's initial brief, cases from other jurisdictions have determined that oral policies can create ministerial duties and it is not uncommon for the law to utilize oral policies of municipalities in determining liability. (Alan's Initial Brief, pp. 15-19) Certainly courts and juries decide issues of fact on a daily basis.

III. NUISANCE

It is apparent that Alan and the Village view the nuisance issue before the Court

with different eyes. Alan has thoroughly addressed the issue of causation in the nuisance action in his initial brief. (Alan's brief, pp. 23-31) The Village, in its response, ignores that Alan's allegation of negligence is a combination of the nearly forty years of stormwater infiltrating its sanitary sewer system and the failure of the Village to abate this problem by pumping the sewage away. Certainly, the Village has discretion to plan and install its sanitary sewer system, but once done, it must maintain and operate the system so as not to create a private nuisance. It is uncontradicted that the Village had knowledge of the problem at Alan's residence with its system when it rained before September 10, 2014. (R. 24, ¶ 2, Pinter Deposition, p. 22, line 20 to p.27, line 13; R. 26, Poirier Affidavit, ¶¶ 2 and 5) Indeed, with the prior owner of Alan's residence, the Village recognized that it was at fault and paid the prior owner damages. (R. 26, Poirier Affidavit, ¶ 4)

As explained in Alan's initial brief, there is no need for expert testimony as to causation when all of the facts needed for causation are admitted. (Alan's Brief, pp. 27-30) The combination of the leaky system and the Village's failure to act to prevent damage to Alan's basement provides the causation needed to show an actionable private nuisance.

It is believed that the Village employees' testimony regarding the Village's negligence is enough to prove negligence as a matter of law. At minimum it is a jury question that should not be decided on summary judgment.

CONCLUSION

This Court should reverse the Court of Appeals and find that the Village's oral policy did create a ministerial duty, that when breached did not provide the Village the immunity of Wis. Stat. § 893.80(4).

Further, this Court should reverse the Court of Appeals as the causation of the element of a private nuisance claim is proved by the admissions of the Village itself.

Dated this 2nd day of November, 2018.

JENSEN, SCOTT, GRUNEWALD
& SHIFFLER, S.C.

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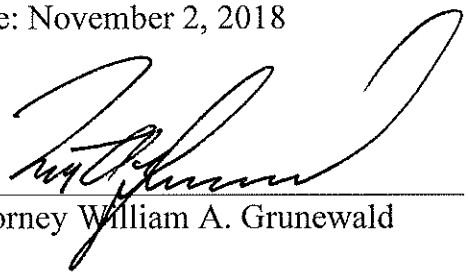
CERTIFICATIONS

I certify as follows:

A. This brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,946 words.

B. The text of electronic copy of the brief filed with the court is identical to the text of the paper copy of this brief.

Date: November 2, 2018



Attorney William A. Grunewald

SUPREME COURT
STATE OF WISCONSIN
Appeal No. 2017AP1593

ALAN W. PINTER,

Plaintiff-Appellant-Petitioner,

v.

VILLAGE OF STETSONVILLE,

Defendant-Respondent.

LEAGUE OF WISCONSIN MUNICIPALITIES' AMICUS CURIAE BRIEF

On Petition for Review from the Wisconsin Court of Appeals, District III

Trial Court Case No. 09-CV-9871

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INTRODUCTION

The League of Wisconsin Municipalities (League) is a non-profit, non-partisan voluntary association of 592 Wisconsin cities and villages cooperating to improve and aid the performance of local government. We asked to file an amicus brief in this case because we are concerned by plaintiff's expansive arguments regarding what can constitute a ministerial duty. We are also concerned by language in *Bostco* and the potential that the Court will resolve the issues presented herein in a manner that will greatly diminish the immunity protections granted municipalities by the legislature under Wisconsin Statute § 893.80(4) for acts done in the performance of discretionary functions.

ARGUMENT

The League fully endorses the Village's brief. We write separately to underscore that a former municipal employee's personal guideline is not a law or policy sufficient to impose a ministerial duty, and to argue that in a municipal system requiring employees to make discretionary operational decisions, such decisions are entitled to immunity, even in the context of a private nuisance claim. We do not write separately on the issue of what a plaintiff must prove to prevail on a private nuisance claim and whether such proof requires expert testimony. In Part II of its brief, the Village thoroughly explains what Pinter must prove in order to prevail on his private nuisance claim based on the Village's alleged negligent maintenance of the system, and demonstrates why expert testimony is necessary in this case. We agree with

the Village and the court of appeals that such matters fall outside the realm of ordinary experience and comprehension. For the reasons set forth by the Village and for the reasons stated below, we urge this Court to affirm the decisions of the court of appeals and the circuit court.

A FORMER MUNICIPAL EMPLOYEE'S PERSONAL GUIDELINE IS NOT A LAW OR POLICY SUFFICIENT TO IMPOSE A MINISTERIAL DUTY.

Pursuant to Wis. Stat. § 893.80(4), a municipality is immune from "liability for legislative, quasi-legislative, judicial, and quasi-judicial acts, which have been collectively interpreted to include any act that involves the exercise of discretion and judgment." *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, ¶ 54, 277 Wis. 2d 635, 691 N.W.2d 658 (quoting *Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, ¶ 21, 253 Wis. 2d 323, 646 N.W.2d 314). Conversely, a municipality is not immune from nondiscretionary or "ministerial" acts. *Id.* ¶ 54. A ministerial act is one that "involves a duty that 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." *Id.*

The first step in the ministerial duty analysis is to identify a source of law or policy imposing the alleged duty. *Am. Family v. Outagamie Cnty.*, 2012 WI App 60, ¶ 13, 341 Wis. 2d 413, 816 N.W.2d 340 (citing *Pries v. McMillon*, 2010 WI 63, ¶ 31, 326 Wis. 2d 37, 784 N.W.2d 648). A municipal employee's

personal guideline, particularly a *former* employee's guideline, should not establish a ministerial duty imposed by law, unless one can point to a statute, rule, or policy dictating the legal authority for the alleged duty. *See id.* ¶ 23 (plaintiff who did not cite any statute, rule, or policy dictating when a flagger may release traffic into an intersection failed to identify a ministerial duty positively imposed by law). When there is no evidence of municipal authority, support, or agreement substantiating a municipal employee's oral guideline, that guideline should not constitute a "policy" or "law" imposing a ministerial duty.

Webster's Dictionary defines "policy" as "a high-level overall plan embracing the general goals and acceptable procedures especially of a governmental body." *Policy Definition*, Merriam-Webster.com, http://www.meriam-webster.com/dictionary/policy (last visited Nov. 26, 2018). This definition implies that a policy should be the product of a consensus, requiring more than one decision maker. If this Court were to hold that a municipal employee can unilaterally create a policy imposing a ministerial duty that binds officials and future employees, without the municipal governing body's input, approval, or knowledge, it would create great uncertainty for Wisconsin municipalities and largely erode the legislatively established governmental immunity.

The discretionary – i.e., non-ministerial – nature of the Wisconsin Department of Natural Resources ("DNR") regulations applicable to sewage

treatment facilities and bypassing, make it clear that a former employee's personal bypass guideline should not be considered a binding policy. The DNR regulations set forth the general conditions all Wisconsin Pollutant Discharge Elimination System permits the DNR issues must include. Wis. Admin. Code NR § 205.07 (Oct. 2018). These conditions include a general prohibition of "bypassing," defined as the "intentional diversion of waste streams from any portion of a sewage treatment facility or a wastewater treatment facility." *Id.* §§ 205.05(1)(u), 205.03(5). Any noncompliance is a permit violation and grounds for, inter alia, enforcement action or permit termination. *Id.* § 205.07.

There is a limited exception to the bypass prohibition. The DNR *may* approve a bypass when the bypass was unavoidable to prevent loss of life, personal injury, or severe property damage *and* when there were no feasible alternatives to the bypass. *Id.* § 205.07(1)(u)3 (emphasis added). However, permittees must also "take all reasonable steps to minimize or prevent the likelihood of any adverse impacts to the public health, the waters of the state, or the environment resulting from noncompliance" with permit conditions – e.g., an impermissible bypass. *Id.* § 205.07(1)(k). A municipality, or its employee(s), operating a sewage treatment facility must discern whether there is an unavoidable threat of death, personal injury, or severe property damage; and whether there are any feasible alternatives to bypassing (the DNR regulations provide five examples); all while taking all reasonable steps to minimize or prevent the likelihood of adverse environmental impacts.

These regulations inherently require the exercise of discretion. Transforming an employee's personal guideline regarding when to consider bypassing a sewage treatment facility into a policy imposing a ministerial duty would directly undermine the legislative immunity afforded to municipalities for discretionary acts. A municipality's good faith decision to haul sewage away instead of pump it into public waters is the type of discretionary decision that warrants the protection of governmental immunity.

While case law contains myriad sources of ministerial duties, no Wisconsin court has found a ministerial duty arising from an oral policy, much less a guideline. In *Pries v. McMillon*, 2010 WI 63, 326 Wis. 2d 37, 784 N.W.2d 648, this Court acknowledged that a variety of sources can create a ministerial duty:

> Although we have not expressly defined what manner of "law" is sufficient in this context to serve as a source for a ministerial duty, we have traditionally assessed a wide variety of materials to determine whether a ministerial duty existed. *See, e.g., Bicknese, 260* Wis.2d 713, ¶ 25, 660 N.W.2d 289 (evaluating employee policy manual); *Lodl,* 253 Wis.2d 323, ¶¶ 28–30, 646 N.W.2d 314(reviewing police department operations policy); *Kimps,* 200 Wis.2d at 14–15, 546 N.W.2d 151(assessing employee job description). Moreover, the court of appeals has understood "law" in this context to encompass a relatively broad, but not limitless, spectrum of materials. *See* Meyers v. Schultz, 2004 WI App 234, ¶ 19, 277 Wis.2d 845, 690 N.W.2d 873 (concluding that manufacturers' instructions that the governmental unit did not create and that did not establish a contractual

> obligation by the entity was not "an act of government" that could satisfy the minimal requirements of a law or policy for purposes of the ministerial duty exception).

Pries, 326 Wis. 2d 37, ¶ 31. Each example above stemmed from written materials. Moreover, this Court's statement in *Pries* that the written instructions in that case fell "within the range of *documents* that could serve as the basis for a ministerial duty" suggests a "law" or "policy" imposing a ministerial duty should be in writing, even if the limits of what written material is sufficient have yet to be defined. *Id.* ¶ 32 (emphasis added).

Pinter's brief relies on the non-binding Kansas Supreme Court case of *Thomas v. County Commissioners*, 293 Kan. 208, 262 P.3d 336 (2011), to support the argument that an oral policy can impose a ministerial duty. Pl. Appellant Pet'r's Br. 16. In *Thomas*, the court considered whether Kansas' discretionary function exception afforded a prison guard and a shift supervisor immunity from suit for breach of a duty of care relating to inmate safety following an inmate suicide. *Thomas*, 262 P.3d at 210, 219-20. The oral policy Pinter points to prohibited prison guards from allowing inmates to cover their cell windows. *Id.* at 214. However, Pinter's analysis mistakenly places the court's emphasis on the fact that the policy was oral rather than on the fact it was one of several policies that did not allow the guard in question any discretion. Moreover, *Thomas* is factually different from the instant case in several important ways.

First, in *Thomas*, there was an official written policy dictating how staff must operate to ensure inmates' safety at all times. *Id.* at 211-14. Second, the portions of the written policy at issue in the case required guards to take very specific action in well-defined situations and left little to no room for discretion, unlike the DNR regulations. *See id.* at 212-14. Third, the oral policy in *Thomas* was, in fact, a policy; not simply an employee's personal guideline. The oral policy was set forth by the director of the department of corrections, a person with policymaking authority, who testified that, although not in the written policy manual, the window coverings policy was clearly communicated to prison staff. *Id.* at 214. Moreover, the oral policy did not allow for discretion; it mandated a single course of action – guards must not allow inmates to cover cell windows. Finally, the court's decision in *Thomas* focused on whether guards had discretion to perform policy tasks, including preventing inmates from covering cell windows, rather than on the manner in which those tasks were set forth. *See id.* at 237. The oral policy was only one of several factors the court considered when concluding the prison guard did not have discretion and was, thus, not protected by immunity. *Id.* (finding that a prison guard had no discretion to decline to perform 15-minute checks and conduct cell shakedowns, as required by written policy, or to allow inmates to cover their cell windows, as prohibited by oral policy).

In the instant case, the village did not have a written policy regarding bypassing the sewage treatment facility. The DNR regulations, while not a

municipal policy, do offer guidance for such a situation, but clearly require employees to use discretion when determining whether to perform a bypass. The oral guideline regarding the fourth rung was merely a former employee's personal guideline, not a policy, and did not dictate a single course of action mandatory for all other employees to follow. Moreover, there is neither evidence the former employee had authority to establish a mandatory policy nor evidence of any consensus within the municipality making the employee's personal guideline mandatory and binding on all future municipal employees. Accordingly, *Thomas* is factually distinct and does not provide meaningful guidance for this case.

WISCONSIN STATUTE § 893.80(4) PROVIDES IMMUNITY FOR A MUNICIPAL EMPLOYEES' DISCRETIONARY OPERATIONAL DECISIONS IN OPERATING A MUNICIPAL SYSTEM, EVEN WHEN PRIVATE NUISANCE IS ALLEGED.

It is one thing for the judiciary to abrogate judicially-created municipal tort immunity and quite another for the judiciary to abrograte municipal tort immunity granted by the legislature. In 1963, the legislature quickly responded to the Wisconsin Supreme Court's abrogation of judicially-created municipal tort immunity in *Holytz v. City of Milwaukee*, 17 Wis.2d 26, 40, 115 N.W.2d 618, 625 (1962) by enacting a law limiting tort actions against municipalities.[1]

[1] See 1963 Laws of Wisconsin, ch. 198, creating Wis. Stat. sec. 331.43(3), predecessor to what is now sec. 893.80(4).

Wisconsin Statute sec. 893.80(4) provides in pertinent part as follows:

> No suit may be brought against any ... political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor may any suit be brought against such corporation, subdivision or agency ... or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

This Court has long interpreted legislative and quasi-legislative functions as those requiring the exercise of discretion. Municipal decisions concerning adoption, design, and implementation of public works systems are discretionary, legislative decisions for which a municipality enjoys immunity. *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, ¶¶ 8-9, 277 Wis. 2d 635, 649, 691 N.W.2d 658, 665. Given the grant of immunity for such decisions, it seems evident that a municipality need not choose a system that can handle every event; given municipal budgets and needs, municipal systems will, necessarily, have certain limitations. "Even if the system is poorly designed, a municipal government is immune for this discretionary act." *Id.* at ¶60, 277 Wis.2d at 678, 691 N.W.2d at 679-680 (quoting *Welch v. City of Appleton*, 2003 WI App 133, ¶ 13, 265 Wis.2d 688, 666 N.W.2d 511).

Although municipalities have immunity for decisions relating to design and implementation of public works systems, a municipality may have liability if it maintains or operates its system in a manner that constitutes a nuisance. A private nuisance is a "condition or activity which unduly interferes with the private use and enjoyment of land ...." *City of Milwaukee*, 2005 WI 8, ¶30, 277

Wis. 2d 635, 659, 691 N.W.2d 658, 670; *Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶30, 350 Wis. 2d 554, 574, 835 N.W.2d 160, 171.

"It is possible to have a nuisance and yet no liability. … liability depends upon the existence of underlying tortious acts that cause the harm." *Milwaukee Metro. Sewerage Dist. v. City of Milwaukee*, 2005 WI 8, ¶ 25, 277 Wis. 2d 635, 656, 691 N.W.2d 658, 669. Wisconsin follows Restatement (Second) of Torts §822 which provides the following elements for liability for an unintentional private nuisance:

> 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 …
>
> …
>
> (b) unintentional and otherwise actionable under the rules controlling liability for negligent ... conduct....

City of Milwaukee, at ¶ 32, 277 Wis. 2d at 660, 691 N.W.2d at 671; *Bostco* at ¶ 31, 350 Wis. 2d at, 576, 835 N.W.2d at 171.

In *City of Milwaukee*, this Court stated:

> [I]t is clear that under the law since *Holytz* and the enactment of the immunity statute that a municipality *may* be liable for a nuisance founded upon negligent acts…. Whether immunity exists for nuisance founded on negligence depends upon the character of the negligent acts. If the acts complained of are legislative, quasi-legislative, judicial, or quasi-judicial—that is discretionary—the municipality is protected by immunity under § 893.80(4). …. Conversely, immunity does not apply if the negligence involves an act performed pursuant to a ministerial duty. …. Thus, when analyzing claims of immunity under § 893.80(4) for nuisances, the proper inquiry is to examine the character of the underlying tortious acts.

City of Milwaukee, 2005 WI 8, ¶ 59, 277 Wis. 2d 635, 676, 691 N.W.2d 658, 679 (citations and n. 17 omitted). *Bostco* confirms that is the proper immunity analysis. *Bostco,* 2013 WI 78, ¶ 3, 350 Wis. 2d 554, 565-566, 835 N.W.2d 160, 166.

In this case, Pinter's ordinary negligence and private nuisance actions allege that the Village was causally negligent in creating a private nuisance by doing two things: (1) not bypassing the Village's system and pumping raw sewage into the river sooner; and (2) by negligently maintaining the Village's system. Although *City of Milwaukee* and *Bostco* set forth the law that applies in this case, those cases are factually very different from this case. In *City of Milwaukee*, the sewerage district alleged that the City's broken water main caused the rupture and collapse of its sewer interceptor. In *Bostco*, the nuisance was the sewerage district's negligent maintenance of the Deep Tunnel which drew down groundwater, deteriorating the wood pilings supporting Bostco's building foundations, resulting in structural damage to the buildings. Those cases did not involve discretionary decisions. Here, Pinter alleges that the nuisance is the Village's alleged negligent maintenance of the system which allows stormwater to infiltrate the system and overwhelm the lift station during heavy rain events. If Pinter proved that the Village negligently maintained its system and that that negligence caused the system to back up in his basement, Pinter would prevail on his private nuisance claim. This case differs from *City of Madison* and *Bostco* because the system typically operates

without problem; In fact, one of Pinter's claims is based on his belief that the system *can* be operated in such a manner that it won't back up into basements. Pinter is alleging that Duellman's failure to pump and bypass into the river created the nuisance rather than any problem inherent with the system itself.

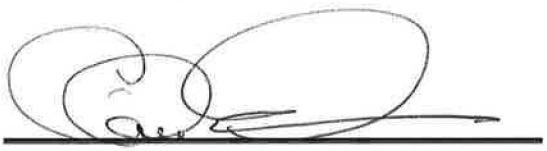
Unlike *City of Milwaukee* and *Bostco*, this case presents a situation where a municipality maintains a sewerage system that requires the wastewater operator to make operational judgments during heavy rain events. A municipal sewer system that requires discretionary operational decisions to avoid sewer backups is not in and of itself a private nuisance if an employee makes the wrong call. If an employee makes the wrong judgment call and that results in a sewer backup, that does not change the discretionary nature of the decision and the municipality is still immune from liability. This may seem unsatisfactory, particularly to an injured plaintiff. However, the legislature has granted municipalities immunity for discretionary decisions.

CONCLUSION

For the reasons stated above, the League urges this Court to affirm the decision of the court of appeals.

Respectfully submitted December 3, 2018.

League of Wisconsin Municipalities

By: 

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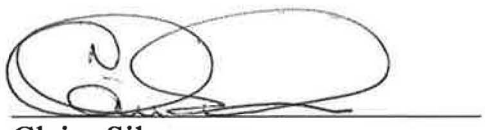
CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 2,942 words.

I further certify that the electronic brief submitted in compliance with the requirements of sec. 809.19(12) is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate is included with the paper copies of this brief filed with the Court and mailed this day to all parties.

Dated: December 3, 2018.



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