

RECEIVED

SUPREME COURT OF WISCONSIN

12-14-2012

**CLERK OF SUPREME COURT
OF WISCONSIN**

**MARK W. SHOWERS,
REAL MARKETING, LLC and
SHOWERS APPRAISALS, LLC,**

Plaintiffs-Appellants-
Petitioners,

Appeal No.:
2011AP001158

-vs-

**MUSSON BROS., INC, and
WEST BEND MUTUAL INSURANCE
COMPANY**

Defendants-Respondents-
Cross-Appellants,

**LEAGUE OF WISCONSIN
MUNICIPALITIES MUTUAL
INSURANCE and
CITY OF OSHKOSH,**

Defendants-Cross-
Respondents.

BRIEF OF PLAINTIFFS-APPELLANTS-PETITIONERS

DEMPSEY LAW FIRM, LLP

Daniel J. Posanski, SBN 1045352
Gerardo Medina, Jr., SBN 1085890
1 Pearl Avenue, Suite 302
P.O. Box 886
Oshkosh, WI 54901
Phone: 920-235-7300
Fax: 920-235-2011

Attorneys for Plaintiffs-
Appellants-Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
STATEMENT OF ISSUES	v
STATEMENT ON PUBLICATION.....	vi
STATEMENT OF CASE.....	1
I. Nature of Case.....	1
II. Procedural Status, Proceedings Below, and Dispositions.....	3
STATEMENT OF FACTS.....	4
A. The Property at Issue.....	7
B. Problems During Construction.....	7
C. The June 8 Storms.....	11
D. The June 12 Flood.....	14
ARGUMENT.....	18
I. The <u>Lyons</u> Test Does Not Apply To Contractors Exercising Their Own Discretion Without Government Approval.....	19
A. The DOT Specification Are Not Reasonably Precise.....	22
i. DOT oversight does not alone curtail a contractor's contractually delegated discretion.....	26
ii. The DOT and City did not approve of Musson's means and methods decisions....	29
B. Musson's Actions Did Not Conform To the DOT and City Specifications.....	32
II. Musson Had a Ministerial Duty to Maintain Proper Drainage on the Construction Site.....	40

A.	The DOT Specifications Imposed a Ministerial Duty on Musson to Maintain Adequate Drainage.....	42
B.	Wisconsin Law States that the Maintenance of Storm Sewers is a Ministerial Duty	44
	Conclusion.....	48

TABLE OF AUTHORITIES

CASES

<u>Allstate Ins. Co., v. Metropolitan Sewerage Comm. of the County of Milwaukee</u> , 80 Wis. 2d 10, 258 N.W.2d 148 (1977)	44
<u>Anhalt v. Cities and Vill. Mut. Ins. Co.</u> , 2001 WI App 271, 249 Wis. 2d 62, 637 N.W.2d 422	44
<u>Bostco LLC v. Milwaukee Metro. Sewerage Dist.</u> , 2011 WI App 76, 334 Wis. 2d 620, 643, 800 N.W.2d 518	45, 46
<u>Boyle v. United Technologies Corp.</u> , 487 U.S. 500, 108 S.Ct 2510, 101 L.Ed.2d 442 (1988)	20
<u>Bronfeld v. Pember Companies, Inc.</u> , 2010 WI App 150, 330 Wis. 2d 123, 792 N.W.2d 222	23, 26, 27, 28
<u>Estate of Brown v. Mathy Construction Co.</u> , 2008 WI App 114, 313 Wis. 2d 497, 765 N.W.2d 417	23, 24, 25
<u>Estate of Lyons v. CNA Insurance Companies</u> , 207 Wis. 2d 446, 558 N.W.2d 658 (Ct. App. 1996) ...	2, 18, 19, 20, 21, 22, 23, 24, 30, 33, 40
<u>Geuder, Paeschke & Frey Co. v. City of Milwaukee</u> , 147 Wis. 491, 133 N.W. 835 (1911)	45
<u>Jankee v. Clark County</u> , 222 Wis. 2d 151, 585 N.W.2d 913 (Ct. App. 1998)	29, 30
<u>Kierstyn v. Racine Unified Sch. Dist.</u> , 228 Wis. 2d 81, 596 N.W.2d 417 (1999)	43
<u>Kimps v. Hill</u> , 200 Wis. 2d 1, 546 N.W.2d 151 (1996)	41, 42, 48
<u>Lewis v. Babcock Indus., Inc.</u> , 985 F.2d 83 (2 nd Cir. 1993)	30, 31
<u>Lodl v. Progressive N. Ins. Co.</u> , 2002 WI 71, 253 Wis. 2d 323, 646 N.W.2d 314	33
<u>Major v. County of Milwaukee</u> , 196 Wis. 2d 939, 539 N.W.2d 472 (Ct. App. 1995)	42
<u>Menick v. City of Menasha</u> , 200 Wis. 2d 737, 547 N.W.2d 778 Ct. App. 1996)	44, 45, 48
<u>Meyers v. Schultz</u> , 2004 WI App 234, 277 Wis. 2d 845, 690 N.W.2d 873. 42	

<u>Milwaukee Metro. Sewerage Dist. v. City of Milwaukee</u> , 2005 WI 8, 277 Wis. 2d 635, 691 N.W.2d 658.....	45,48
<u>Oliver v. Oshkosh Truck Corp.</u> , 96 F.3d 992 (7 th Cir. 1996)	30
<u>Trevino v. General Dynamics Corp.</u> , 865 F.2d 1474 (5 th Cir.)	31
<u>Willow Creek ranch, LLC v. Town of Shelby</u> , 2000 WI 56, 235 Wis. 2d 409, 611 N.W.2d 693.....	41

Statutes

Wis. Stat. § 893.80	3,20,40
---------------------------	---------

STATEMENT OF ISSUES

I. Is Musson Bros. Inc. ("Musson"), a private governmental contractor, entitled to the protections of sovereign immunity under Estate of Lyons v. CNA Insurance Company, 207 Wis. 2d 446, 558 N.W 2d 658 (Ct. App. 1996) despite the contract terms allowing Musson to make their own wholly discretionary decisions, which were not explicitly or implicitly approved by the City of Oshkosh or State officials?

Circuit Court's Determination: The Circuit Court made no specific findings but implicitly concluded yes.

Court of Appeals' Determination: The Appellate Court concluded yes, finding that the contractor's discretion was sufficiently curtailed by the presence of the DOT, who oversaw the project, despite the lack of reasonably precise specifications.

II. Did Musson have a ministerial duty to maintain proper drainage on the construction site to protect the Showers Appraisals, LLC, Real Marketing, LLC and Mark W. Showers (collectively "Showers") property?

Circuit Court's Determination: The Circuit Court concluded no.

Court of Appeals' Determination: The Appellate court concluded no, finding that Musson was not "maintaining" an existing system, but building a new system.

STATEMENT ON PUBLICATION

As a result of the Court of Appeals decision in this case, there are now conflicting cases in Wisconsin dealing with the application of government immunity to private contractors. Publication of the Wisconsin Supreme Court's decision will thereby advance judicial guidance on this issue.

STATEMENT OF CASE

I. NATURE OF CASE

This appeal arises from a government-hired private contractor's utter failure to provide for the safety and protection of private homes and businesses. In 2008, Ohio Street in the City of Oshkosh was totally reconstructed, i.e. the sanitary sewer, storm sewer, water main and roadway were all replaced. Musson was hired as the general contractor. As contractor, Musson was required to follow the Department of Transportation Standard Specifications for Highway and Structure Construction, which, in part, states that the contractor is **solely** responsible for the means, methods, techniques, sequences, and procedures of construction. (R.52; A.App.00047.)

While there are many material facts at issue in this case, one thing that is clear is that Musson was able to, and did in fact, exercise their total discretion on the "means and methods" of construction. Significantly, Musson removed the entire storm sewer line along the Project at once, instead of doing it "block-by-block" as they agreed to do in preconstruction meetings with the City and State

officials. Both City and State officials admit that while they did not agree with Musson's block-by-block method, they lacked the contractual power to intervene, as that type of decision was a "means and methods" issue.

On June 12, 2008, the City of Oshkosh was hit by a significant storm and Showers sustained tremendous damages to their property. Several discretionary decisions made by Musson were substantial factors in causing Showers' damages. Since these same discretionary decisions were erroneously made, and not subject to approval by City or State officials, Musson simply cannot claim contractor immunity under Estate of Lyons v. CNA Insurance Companies, 207 Wis. 2d 446, 558 N.W.2d 658 (Ct. App. 1996).

However, the Court of Appeals believed that the mere presence of the DOT on the construction site was sufficient to curtail Musson's discretion. It is Showers' belief that the Record before the Court shows that Musson's decisions were never approved by the DOT or any governmental authority, explicitly or implicitly. At the very least, the DOT's presence alone could not constitute substantive review and

approval, which based on case law, is required to curtail a contractor's discretion for the purposes of immunity. There is nothing in the record to suggest that the DOT or City did any type of review of Musson's discretionary decisions, nor were they required to.

II. PROCEDURAL STATUS, PROCEEDINGS BELOW AND DISPOSITIONS.

On July 24, 2009, a Summons and Complaint were filed pursuant to Wis. Stat. § 893.80(1g), naming the City and Musson as Defendants. The City and Musson both filed cross-claims against each other for indemnification. The City and Musson both filed Motions for Summary Judgment against all of Showers' claims. The trial court granted the motions and dismissed Showers' case outright, stating that governmental immunity applied to both Musson and the City. The trial court did not make any specific findings under the Lyons test.

Showers timely appealed as to Musson, asking the Appellate Court to determine, (1) whether Musson qualified for contractor immunity under the Estate of Lyons test, (2) if Musson had a ministerial duty to

maintain adequate drainage during construction, and (3) whether the June 8th and June 12th storms constituted a known and compelling danger requiring Musson to implement pumps. Musson in turn filed a Cross-Appeal against the City for indemnification.

The Court of Appeals issued a Notice of Oral Argument on January 10, 2012, limiting argument to whether the discretion granted under the DOT Specifications met the reasonably precise prong of the Lyons test, and whether the “block-by-block” approach was part of the approved specifications for the project. Oral argument on these questions was held on February 28, 2012. On June 27, 2012, the Court of Appeals affirmed the Circuit Court’s decision, 2-1, in a published decision including a dissenting opinion.

STATEMENT OF FACTS

On or about September 12, 2007, the Wisconsin Department of Transportation (“DOT”) and City of Oshkosh (“City”) entered into a State/Municipal Agreement to initiate and effect the Ohio Street improvement project (“Project”). (R. 52; A.App.00034-00037.) The City was solely responsible for the sanitary sewer, water main work and sealing concrete

joints in addition to its responsibility for the amounts not paid by Federal and State funds for real estate acquisition, roadway costs, concrete and lighting, amounting to roughly 25% of the total Project. (Id.)

The DOT opened the Project up to bids from independent professional contractors, providing a number of requirements for those who wished to bid on the Project. Specifically the successful bidder agreed to:

“be responsible for any damages to property or injury to persons occurring through their own negligence or that of their employees or agents, incident to the performance of work under this contract, pursuant to the **Standard Specifications for Road and Bridge Construction** applicable to this contract. (R. 52; A.App.00039)

The Department of Transportation Standard Specifications for Highway and Structure Construction (“DOT Specifications”) referenced above contains numerous specifications and guidelines that the successful bidder must comply with throughout the course of the Project. Significantly:

- The contractor is **solely responsible** for the means, methods, techniques, sequences, and procedures of construction. (A.App.00047; § 105.5.1(4))
- Before suspending the work, take the necessary precautions to prevent damage to the project,

prevent traffic accidents, and **provide for normal drainage.** (A.App.00051; § 107.14(3))

- The contractor shall... "[c]onduct operations and maintain the work **so that adequate drainage is provided at all times.**" (A.App.00047; § 105.5.2(2))
- If it is necessary in the prosecution of the work to interrupt existing surface drainage, sewers, or under drainage, **provide temporary drainage until completing permanent drainage work.**" (A.App.00056; § 205.3.3)
- If storing salvaged topsoil on the right-of-way during construction operations, stockpile it to preclude interference with or obstruction of surface drainage. (Id.)
- Contractor must "[p]reserve, protect and maintain all existing tile drains, sewers, and other subsurface drains, or parts thereof, that the engineer judges should continue in service without change." (Id.)
- "If the contractor damages **or interrupts services,** the contractor **shall notify the utility promptly.**" (A.App.00054; § 107.22(3))
- Must "**[u]se every reasonable precaution to prevent damage to all property including ... all** underground structures including water or gas shut-off boxes, water meters, pipes, conduits, etc.; within or outside of the right-of way." (A.App.00050; §107.11.1(2))
- "[a]ssume liability for all damage to public or private property resulting from contractor operations, defective work or materials, or non-execution of the contract." (A.App.00050; § 107.11.1(3))

With all of these requirements considered, Musson bid \$4,393,833.15 on December 11, 2007. (R. 52, A.App.00057.) This bid was ultimately accepted, and a

contract between the State and Musson was entered into for the work. (Id.)

A. The Property at Issue.

The Showers property ("Property") is located at 601 W. 6th Avenue, in Oshkosh, Wisconsin. (R. 48, A.App.00109.) The real estate was purchased in June of 2007, with construction of a new building being completed around December 15, 2007. (Id.) During construction of the Property, the City required that Showers connect his down spouts and sump pump to the Ohio Street storm sewer. (Id.) The City also required the construction of a storm sewer inlet in the Showers parking lot, which would connect it to the Ohio Street storm sewer. (Id.) These connections were required by the City, and Showers incurred the cost. (Id.)

B. Problems During Construction.

The design for this Project was prepared in concert between the DOT and the City. (R.52, A.App.00107.) While there were specifications in place, and the DOT and City did have representatives on site as well, the City and the State admit they completely delegated their discretionary authority to

Musson when it came to “means, methods techniques, sequences, and procedures” of construction.

(A.App.00047.) When it came to carry out the design for the Project, Musson did not have a duty or obligation to seek City or State input or approval. (Id.) Simply put, the City and State relied upon Musson’s expertise on how to carry out the design, which it paid for accordingly.

Shortly after the Project started, numerous problems arose between Musson, the City and the DOT. Ryan Schanhofer (“Schanhofer”), the DOT engineer for the DOT, kept a daily diary as the Project progressed. The reason for the daily log was to document what Musson was doing in the event there is a future issue with Musson’s work so the City, State, or third parties could seek recourse against Musson should it be determined that Musson was negligent when carrying out the DOT’s design for this Project.

From Schanhofer’s notes, we know that at a contractors meeting on April 23, 2008, all the parties discussed how to install the utilities.

“It was agreed upon that the best way to do things is to keep everything caught up on in one or two block segments. ***The storm needs to be***

caught up so that water can be directed into the new system and off the project."

(R. 52; A.App.00062.) Despite the testimony and diary entries which reflect this notion, Musson disputes whether this was the agreed upon method of construction. (R.52; A.App.00087, 00097.) Regardless of the disagreement, the City maintains this was a "means and methods" issue, so nothing could be done. (R.52; A.App.00090.)

Almost immediately after starting the project, Musson plugged and capped the existing storm system that was in place, (R.52; A.App.00098.) effectively removing the only drainage system on site. No further action was immediately taken to provide for any level drainage on the site. (R. 52; A.App.00099, 00094.) Musson then approached Schanhofer on April 25, 2008, and asked if they could remove the pavement on the remainder of the Project. (R. 52; A.App.00063.) Schanhofer did not "approve" their request in the normal sense of the word, only telling Musson there was nothing in the contract that prevented them from doing so. (Id.)

Upon seeing these actions, the City vigorously objected. Marc Miller, a water maintenance worker for the City, and Randy Peterson, an inspector for the engineering department of the City, confronted Musson and told them the storm sewer should be reconnected. (R.52; Pet.App.00068, 00093.) The City wanted a temporary connection for the storm at each point where there was a disconnection, which is how they normally approach similar projects. (R.52; A.App.00092.) Despite these concerns, the City could do nothing, as Musson's actions were consistent with the "means and methods" authority they had been delegated by the contract. (R.52; A.App.00083, 00072.)

By May 13, 2008, Musson had totally abandoned the storm sewer that falls into the river. (R.52, A.App.00067.) Consequently, Musson began pumping water into the sanitary sewer, even though pumping into the sanitary and abandoning the storm sewer was contrary to their own pre-construction proposal. (Id.) Due, at least in part, to the disconnection of the storm, the water had nowhere to go. (R.52; A.App.00098.) Despite the disagreements over Musson's performance, there was nothing that could be done as these were all

"means and methods" decisions. (R.52, A.App.00083, 00072.)

Poor means and methods decisions led to conflicts and tension between Musson and the City, and DOT, despite the City and DOT not being able to intervene. (See R.52; A.App.00059-00061; 00083, 00072.) Rumors began circulating that Musson was performing poorly and had no idea what they were doing. (R.52; A.App.00065.) The relationship deteriorated to the point where, by June 10, 2008, the City was contacting Schanhofer to see if it could shut Musson down. (R.52; A.App.00071-00072.) Schanhofer reiterated the simple fact that these were means and methods decisions, and he was not in the business of telling Musson how to do their job. (Id.)

C. The June 2008 Storms.

On June 8, 2008, Oshkosh was hit by its first of two large storms. Schanhofer estimated that 4.25 of inches of water fell on the site. (R.52; A.App.00070.) Outside of the Showers Property, the excavated portion of the street was holding standing water. (R.48; A.App.000110.) With the storm sewer disconnected, the only way Musson could deal with the water anywhere on

the Project was to pump it, however, as Musson themselves noted, the pumps could not keep up. (A.App.00069-00070.) The City blamed all of the flooding problems on Musson's operations and that Musson made the flooding worse than it would have been. (R.52; A.App.00071, 00073.) This is corroborated by the fact that Musson stated before the June 12 storm that they would not run the pumps until payment was guaranteed. (R.52; A.App.00072)

By removing the roadway (2 feet below grade) and leaving the cross streets still in place and above the (now) excavated roadway, a "bathtub" effect was created in front of the Showers Property, meaning the water was boxed in with nowhere to flow. (R.48; A.App.00110.) With the intersections in place, water could not flow through. (Id.) There also could not be gravity flow unless the water could enter the open inlets, which were covered with mud and dirt. (Id.) In addition, there were large mounds of excavated soil sitting on Ohio Street (contrary to the contract) that further prevented water from draining down the Street as it was designed to do. (R.48; A.App.00111.) Mr. Showers spoke with employees for both the City and

Musson after the first storm and asked if something was going to be done to prevent this "bathtub" effect from occurring a second time with another large storm forecasted. (R.48; A.App.00110.) The City and Musson indicated they did not know why this was occurring and that there was nothing they could do. (Id.)

By June 11, 2008, everyone involved with the reconstruction of Ohio Street was well-aware of the potential for more rain. Thus, the City instructed Musson to prepare a pumping plan. (R.52; A.App.000736.) Musson admittedly had never planned for a storm of anything more than half inch of rain, much less the storm that was coming. (R.52; A.App.00102.) Neither Musson nor the City completed a calculation to determine whether the pumping plan would sufficiently maintain the level of drainage of the former system, let alone the flood waters which they knew would come. (R.52; A.App.00104.) In fact, Musson did not do *any* calculations at any time during construction. (Id.) Still, a Musson employee opined that there were insufficient pumps to handle the June 12 flood waters. (R.52; A.App.00100.)

On the evening before the storm of June 12, 2008, Musson allegedly began placing the pumps as called for in the pumping plan, which was submitted with the City. (R.52; A.App.00073-00074.) Importantly, there is not one person from Musson, State or City who has stated with sworn particularity, the number of pumps that were actually placed, where the pumps were placed, or whether the pumps were operational (A.App.00095.) On the other hand, Showers has provided several witnesses who stated that there were no pumps before or after the storm. (R.48; R.49; R.50; R.51.)

By 5:30 p.m. during the June 12 storm, water was already beginning to fill Ohio Street's removed roadbed. (R.51; A.App.00133.) An employee of Showers verified that no water intrusion had yet occurred upon noticing the high water levels. (R.51; A.App.00133-00134.) By the time the Showers' employee left work, the water on Ohio Street was already too high to navigate across. (Id.) There were no pumps visible on Ohio Street for as far north or south as one could see from the Showers Property. (R.48; R.49; R.50; R.51.) Heavy rains fell throughout the evening into night.

D. The June 12 Flood.

As the flood waters rose, numerous property owners near the Project experienced significant damages. Mr. Showers was only one of those affected. Schanhofer admits that there were no pumps near Showers' property. (R.52; A.App.00084, 00074.) With Ohio Street in the condition it was in, the lack of pumps meant that there was no possible way that the flood waters could or would move, regardless of the amount of rain that fell. (R.52; A.App.00084) The closest pump appeared to be near the corner of 7th Avenue and Ohio Street, a full block away. (R.48; A.App.00110.) However, it was not running. (Id.)

Upon entering his building, Mr. Showers discovered that seven feet and four inches of water had filled his basement. (R.48; A.App.00110.) It was later discovered that the 117,500 gallons of water outside of the Showers property had sat in the excavated roadbed for approximately 15-18 hours after the storm, with no place to go. (R.27; A.App.00125.) The hydrostatic pressure caused by the "bathtub" of water sitting in front of the building caused Showers' basement floor to rupture and fill the basement with

water. (Id.) Significantly, no water entered through windows nor backed up pipes, as others may have experienced. (R.48; A.App.00111.) This unique damage can be traced directly to the condition of Ohio Street, the lack of pumps, and the amount of time water sat in front of the property. (R.27; A.App.00125.)

It should be noted that Showers retained an engineer, Steven Kaiser ("Kaiser"), to review Musson's actions.¹ Kaiser has reviewed the area and daily reports and has determined that if the level of existing drainage would have been maintained on Ohio Street, the waters would have been drained from the roadway within 0.6 hours as opposed to the 15-18 hours it actually took for the storm waters to recede. (R.27.) While the water sat in the roadbed, hydrostatic pressure increased until eventually causing the basement floor to rupture. (Id.) This would not have happened had the storm sewer not been removed. (Id.) Musson should have taken extra precautions in planning and preventing damage when

¹Kaiser's expert opinions are not disputed by a similarly qualified expert of Musson. Therefore, Kaiser's opinions must be assumed valid as viewed in the light most favorable to Showers for purposes of Summary Judgment.

they decided to remove the entire storm sewer. (Id.) Mr. Kaiser also concludes that the pumping plan, if implemented, was wholly inadequate as it did not maintain the existing drainage. (Id.) It cannot be stressed enough that the damage to the Showers' property was a direct result of the time the water had been standing in front of the property, not the amount of rain that fell.

After the initial damage from the flood was remedied, the sump pump in Showers' basement ran continuously, so Showers contacted the City to determine why this was occurring. (R.48; A.App.00111.) It was discovered that the storm sewer had been disconnected, resulting in the sump pump recycling its own dispelled water that came back onto the property as it had nowhere to drain. (Id.) Neither the City nor Musson, at any time, informed Showers of the disconnected storm sewer, even though Showers' sump pump, down spouts and storm sewer were completely reliant on the Ohio Street storm sewer as its lifeline to drain water from its Property. (Id.)

In total, the damages Showers experienced were extensive. Showers had to move its business activities

to another location for four months while the Property was cleaned, repaired and restored. (Id.) The damage incurred to the business and property is, at a minimum, \$140,000.00. (Id.)

It was not until August 14, 2008, that Musson finally completed installation of the new storm sewer. (R.52; A.App.00071.)

ARGUMENT

Following the Court of Appeals decision, the resolution of this case will determine a fundamental policy question on whether an independent contractor should be afford governmental immunity for their own discretionary acts. The purpose of Lyons immunity was to shield private contractors from liability when they were acting as an agent of a government entity. Estate of Lyons v. CNA Ins. Companies, 207 Wis. 2d 446, 457, 558 N.W.2d 658, 663 (Ct. App. 1996)

Before the Court of Appeals decision, there was no authority for the proposition that a private contractor could claim immunity for **its own** actions or decisions, simply because a government authority was present on the project. The Court of Appeals reasoned that because the government had the ability to

intervene (despite their own position that they did not) they “stood behind” Musson’s discretionary decisions, for which immunity applies. (A.App.00017.) However, this type of “approval”, if any, is nothing more than rubber stamping. While the Wisconsin Supreme Court has not addressed this issue specifically, the case law in other jurisdictions consistently holds that a government entity must engage in a meaningful review and analysis of a private contractor’s discretionary decisions or designs if there is to be approval, curtailing the contractor’s discretion.

This Court is not being asked to restrict or eliminate Lyons immunity, but to reverse the Court of Appeals decision, as it is approves rubber stamping as an appropriate method of approving a contractor’s discretionary decisions or designs, thus creating a reasonably precise specification.

I. THE LYONS TEST DOES NOT APPLY TO CONTRACTORS EXERCISING THEIR OWN DISCRETION WITHOUT GOVERNMENT APPROVAL.

The seminal case in Wisconsin regarding contractor immunity is Estate of Lyons v. CNA Insurance Companies, 207 Wis. 2d 446, 558 N.W.2d 658

(Ct. App. 1996). The Lyons case arose from a fatal accident that occurred due to visibility problems related to a bridge design approved by the DOT. Lyons 207 Wis. 2d at 448. Since the DOT had superficially and expressly directed the independent contractor to implement their design decision, made in exercise of governmental discretion, the independent contractor claimed entitlement to the same governmental immunity as the DOT. 207 Wis. 2d at 446-51.

Based on the U.S. Supreme Court's decision in Boyle v, United Technologies Corp., 487 U.S. 500, 512-13, 108 S.Ct 2510, 2518-19, 101 L.Ed.2d 442 (1988), the Lyons court ruled that an independent contractor following official government directives may be an "agent" for the purposes of §893.80 (4), Stats., or is entitled to common law immunity, when:

- (1) the governmental authority approved reasonably precise specifications;
- (2) the contractor's actions conformed to those specifications; and
- (3) the contractor warned the supervising governmental authority about the possible dangers associated with those specifications that were known to the

contractor but not the governmental officials.²

Lyons, 207 Wis. 2d at 457-58. Significantly, unlike the effect the Court of Appeals in this case will have on future similar cases, the Lyons Court refused to cloak independent governmental contractors with blanket immunity. Id. at 455.

The Lyons Court recognized that the purpose of discretionary immunity is to insulate **legislative policy decisions** from judicial examination. Id. at 453-54. With this in mind, in questions involving independent contractor immunity, the focus must be on whether or not the independent contractor was acting simply as an agent of a governmental authority who has retained ultimate authority for the negligent decision. See Id. Lyons does not suggest in any way that an independent contractor will be immunized for carrying out its own discretionary decisions.

The first two prongs of the test “ensure that the challenged decision is within the class of official decisions that should be insulated from judicial

² Musson claims they made the DOT aware of a design flaw in the existing system that was to be replaced. However, when Musson capped the “flawed” system, it was no longer an issue at the time the flooding occurred. As a result, the third prong of Lyons is not at issue in this case.

scrutiny and that the design feature was actually reflected upon **by a governmental official.**" Id., at 458 (emphasis added). The third prong is meant to alleviate any concern that a governmental contractor will ignore its duty to the public and withhold dangers that the government might not know about. Id. Since Musson's decisions were not reflected upon by a governmental official in any meaningful way, governmental immunity does not apply in this case.

A. The DOT Specifications Are Not Reasonably Precise.

While the term "reasonable" inherently allows for some flexibility, it also acts as a limitation on when a contractor may be granted immunity, or the test would simply be "a specification", specific, vague or otherwise. The City, DOT and Musson all admit that Musson maintained the sole discretion to control and decide the "means, methods and techniques" of the Project. This term of the contract expressly granted Musson vast discretionary authority over the most critical aspects of construction.

Musson was granted this discretionary decision making authority without any limitations.

Specifically, Musson was not required to run their discretionary decisions past the DOT or City for acceptance or approval. While certain contract terms required Musson to perform certain objectives, like “maintain drainage”, Musson had the ability to determine for itself how to do so. It cannot be held as a matter of law that a specification that states an overall objective, but not how to accomplish it, can be reasonably precise. While specifications need not spell out every minute detail of a project to qualify as “reasonably precise” (Bronfeld v. Pember Companies, Inc., 2010 WI App 150, ¶ 25, 330 Wis. 2d 123, 135, 792 N.W.2d 222, 228), they also should not be so broad as to leave complete decision making authority with the contractor, who then claims immunity, for its own negligent decision that was made without government input, insight, or approval.

Recently, the Wisconsin Court of Appeals analyzed the reasonably precise prong of the Lyons immunity in Estate of Brown v. Mathy Construction Co., 2008 WI App 114, 313 Wis. 2d 497, 765 N.W.2d 417. In Brown, two people were killed when their car struck an exposed bridge abutment on a segment of a state highway that

was under construction. Brown, 2008 WI App 114, ¶¶ 1-4. As part of the project, workers removed bridge guardrails that provided some protection to bridge users and replaced them with new guardrails, referred to as “energy absorbing terminals” (“EATS”). Id. The estate claimed the independent contractor was negligent for delaying the installation of the EATS (twenty-nine days) after it was feasible to do so, thus causing the fatal accident. Id. The independent contractor claimed Lyons immunity. Id.

The Brown court was faced with the question of whether the safety precautions provided by the DOT were reasonably precise specifications. Id. ¶ 11. The undisputed evidence established that they were. Id. The Court found that the DOT’s plans allowed for the possibility of an undetermined lag between removal of the old guardrails and the installation of the EATS. Id. ¶ 12. It was significant that it was the DOT, **not the contractor**, who made the discretionary decision to keep the road open during the project. Id. It was the DOT who directed where specific instruments, including signs and barrels, were to be used to indicate construction was occurring, even providing a diagram

showing specific traffic control measures which were to be taken. Id. It was the DOT who determined that no temporary barricades or guardrails were necessary between the time that the old guardrails were taken down and the EATs were put in place. Id. These actions all but eliminated any discretion the independent contractor may have had.

In this case, the relevant DOT specifications did not specify when, where, or how to achieve its objectives. Musson had the contractual authority to determine on its own the means and methods of construction. It was Musson who decided to remove the entire road bed, *how* they would maintain drainage, whether to cap the storm sewer, to use or not use pumps, the number of pumps, and to not back-fill next to Showers' property. These were Musson's own decisions not subject to government approval or insight. As Judge Reiley of the Court of Appeals eloquently stated, "... Musson retained the contractual right—the means and methods—to gamble on the method of removal of the storm sewer. Musson remained, however, contractually obligated should its gamble fail. Until now." (A.App.00022.)

The City did not agree with many of Musson's means and methods decisions, but there was nothing that could be done. Arguably, the only reasonably precise specification, which was not part of the original contract, was the last minute pumping plan that the City demanded Musson create for their approval. Still, material issues of fact exist as to whether this specification was actually complied with.

i. DOT oversight does not alone curtail a contractor's contractually delegated discretion.

The Court of Appeals found, based on Bronfeld v. Pember Cos. Inc., 2010 WI App 150, 330 Wis. 2d 123, 792 N.W.2d 222, that while Musson had a discretionary authority, they were contractually obligated to follow the DOT Specifications. (A.App.00013-00014.) The Court also concluded that since there was "genuine oversight" by the DOT, Musson's discretion was sufficiently curtailed. (A.App.00014.) However, the Court of Appeals overlooked critical factual differences between the contract in this case and the one in Bronfeld, clearly distinguishing the two cases.

In Bronfeld, the 250 page manual included "a nine-page section titled 'Maintenance of Traffic',

which contain[ed] **detailed specifications** related to quality assurance, site conditions, sequencing and scheduling, maintenance, equipment, preparation, operations, and traffic control.” Bronfeld, 2010 WI App 150, ¶ 4 (emphasis added). The same section also mandated “the use of **specific** traffic control devices, signs, and barricades” as well as specifies on “how these barricades and signs **must be installed**”. 2010 WI App 150, ¶ 5. In addition, the contractor was required “to submit a traffic control plan to the City of River Falls **for approval**”. Id., ¶ 6 (emphasis added). The contractor followed these requirements, as the City Engineer reviewed the plan, made revisions, and **accepted** it. Id. The contract at issue in Bronfeld did not contain a similar “means and methods” discretionary provision like is at issue in this case.

Unlike Bronfeld, Musson’s specifications were not specific as they contained no details on the “means” or the “how” of construction. Musson was not obligated to submit a plan to the City or DOT for approval on any aspects of the Project. Had this been required, the evidence suggests that the City would not have approved Musson’s “request” to tear up the

entire road bed, as opposed to the block-by-block method preferred, and agreed to, by the City.

Schanhofer himself stated "there [was] nothing in the contract that prevented them from doing this..." While the DOT arguably could have advised and provided input, they simply could not suspend work as a result of a means and methods dispute, which Schanhofer himself admits. (A.App.00083.)

The Court of Appeals found that the DOT could suspend work if contract compliance was an issue, yet they ignore the fact that Musson's discretionary decisions were authorized by the contract, therefore, Musson was in compliance with the contract. There are many ways to skin a cat, and simply put, the DOT could not suspend work simply because they disagreed with a discretionary decision made by Musson after delegating that same authority to Musson in the contract.

Finally, unlike Bronfeld, the specifications at issue in this case do not contain a single reference or requirement as to the type of materials or methods that were to be used by Musson to maintain adequate drainage, or their specific placement (with the exception of the emergency pumping plan). This duty

remained constant throughout the life of the Project. The moment Musson plugged, capped, and totally removed the storm sewer, they were required to implement any type of drainage plan that could have maintained the same level of drainage as the system that had just be removed. There is nothing in the record to even suggest that the City or DOT required any particular method of maintaining drainage on site.

ii. The DOT and City did not approve of Musson's means and methods decisions.

When the contractor is the sole source of a discretionary decision, as Musson is in this case, "in order to meet the first prong of the [Lyons] test, the governmental unit must do more than simply accept, without any substantive review or evaluation, the contractor's exercise of discretion in meeting the given performance standard." Jankee v. Clark County, 222 Wis. 2d 151, 166, 585 N.W.2d 913 (Ct. App. 1998) (rev'd on other grounds). Stated another way, the governmental unit must do more than simply "rubber stamp" a private contractor's discretionary decision.

In Jankee, the County discovered design problems with a window stop being used to prevent patients at a

mental health clinic from opening the windows to escape or injure themselves. Jankee, 222 Wis. 2d at 170-71. The County requested a design change, but later found that the redesign could also be manipulated by patients. Id. After an investigation, the County determined to continue the use of the window redesign without modification. Id. The Court of Appeals held that this constituted approval of reasonably precise specifications. Id.

The Court of Appeals in Jankee cited Oliver v. Oshkosh Truck Corp., 96 F.3d 992 (7th Cir. 1996), for the proposition that there must be more than simple government acceptance for the first prong of Lyons to be met. In Oliver, the 7th Circuit had to determine if the government's approval of a design was meaningful, and not merely a formality. Oliver, 96 F.3d at 998. The type of necessary approval cited in Jankee and Oliver is entirely consistent with jurisdictions outside of Wisconsin. See, Lewis v. Babcock Indus., Inc., 985 F.2d 83, 87 (2nd Cir. 1993) (The purpose of the reasonably precise inquiry is to exclude from the defense those cases where the Government merely rubber stamps a design); Trevino v. General Dynamics Corp.,

865 F.2d 1474, 1480 (5th Cir.) *cert. denied*, 493 U.S. 935, 110 S.Ct. 327, 107 L.Ed.2d 317 (1989) (“When the government merely accepts, without any substantive review or evaluation, decisions made by a government contractor, then the contractor, not the government, is exercising discretion”).

The Court of Appeals concluded that the DOT stood behind Musson’s decisions, despite being unable to point to anything in the record to show an explicit approval, essentially concluding that because the DOT did not intervene, they approved Musson’s decisions. (A.App.00017.) This is, at best, “rubber stamp” approval. Musson was the sole source of their own decisions. While there were weekly meetings and daily oversight among the parties, it cannot be reasonably concluded as a matter of law that the DOT was “standing behind” Musson’s decisions when the DOT itself stated the “means and methods” provision of the contract prevented them from intervening.

The Court of Appeals failed to recognize was that, while there was DOT oversight, there were no contract compliance issues because Musson had complete discretion under the contract on the means and methods

of construction. When the City approached the DOT with their concerns over the block-by-block approach Musson had utilized, the Schanhofer explicitly refused to intervene, citing means and methods. This does not even constitute simple acceptance, let alone acceptance after substantive review or evaluation. Even if it could be concluded there was acceptance by acquiescence, there is nothing in the record to support a conclusion that acceptance was based on a substantial review or analysis, or anything more than mere rubber-stamping.

B. Musson's actions did not conform to the DOT and City Specifications.

Assuming without conceding that the DOT Specifications are reasonably precise, a question of fact in this case is whether Musson actually complied with those directives. The arguments between the City, DOT, and Musson show that Musson not only failed, but failed miserably, to comply with all of the City and DOT Specifications and directives.

The proper inquiry under this prong of Lyons is whether Musson was following the reasonably precise specifications of the DOT at the time when the alleged

negligence occurred. See Lodl v. Progressive N. Ins. Co., 2002 WI 71, ¶ 17, 253 Wis.2d 323, 646 N.W.2d 314. Showers has alleged numerous negligent acts performed by Musson, thus requiring an analysis of each act and whether it was subject to, or the product of, a reasonably precise specification. While there are many alleged negligent acts, the most critical was Musson's disconnection of the storm sewer without immediately implementing an adequate temporary system.

Musson had a duty to conduct operations and maintain the work so that adequate drainage is provided **at all times** and if it became necessary in the prosecution of the work to interrupt existing surface drainage, sewers, or under drainage, **provide temporary drainage** until completing the permanent drainage work. (A.App.00047, 00056.) This meant Musson was obligated to provide a temporary drainage system, in any way they saw fit, when the storm sewer was plugged, capped, and eventually disconnected. However the facts do not establish what, if anything, Musson did to provide temporary drainage.

There are few undisputed facts regarding the adequacy of the drainage system in place, one of which

is that standing water in front of the Showers' property sat there for 15-18 hours, eventually rupturing Showers' basement floor. This was not a consequence of clogged drains or semi-blocked gravity flow paths (the drains were capped and paths were blocked by topsoil). This was still, unmoving water. The only expert in this case has opined that this would not have happened if the existing sewer system was left in place or its level of drainage was maintained on site. (R.47.)

It is undisputed that Musson did not have pumps near the Showers' property. While the water got there by an "act of god", it should not have *stayed* there for that amount of time. If the existing storm sewer had been in place, the water would have drained, slowly, but enough to significantly reduce the time the water was on the property. If any number of pumps were on or near the Showers' property, the water again would not have stood for the amount of time it did. Had Musson acted in accordance with the contract, it would have saved the Showers' property.

The Court of Appeals incorrectly relied on a single statement by Schanhofer that the contract

specifications were followed. (A.App.00016.) However, this single, after the fact, statement by Schanhofer is outweighed by the evidence when viewed in the light most favorable to the nonmoving party. At the very least, there is nothing in this statement which shows approval after a meaningful analysis or review of Musson's decisions.

The evidence actually shows, when viewed in the light most favorable to the nonmoving party, that when it came to the maintenance of drainage, Musson did little to nothing to comply, even before the first of the two major storms. In fact, Musson was completely unaware that they even needed to be pumping. On June 10, 2008, Schanhofer wrote:

Mike R. stopped in the field office late in the day and asked me to call Bob Demesy from the Rhinelander office. **He is the VP and wants to talk to me about where it shows they have to pump water.** I showed Mike in the Spec Book where it covers drainage during construction.

(Pet.App.0065.) This entry shows that as of June 10, 2008, after already plugging and removing the storm sewer, Musson had no idea they were required to maintain drainage during construction, two days before the major storm. Further, he states on June 12, 2008,

"Mike... was working on getting pumps" and "I spoke with Mike about making sure there were adequate pumping devices to drain the system if needed". (A.App.00071-00072.) Again, Schanhofer notes mentioned there were no pumps in front of Mr. Showers' building, as per the plan. (A.App.0084.). Even if Schanhofer's statement is to be considered, it is clearly outweighed by the evidence in the record.

Musson has argued that connecting a new pipe as a way to maintain drainage would have done nothing since it was plugged at the outlet anyway (which was their own decision). This has no relevance whatsoever. Plugging the sewer only meant that Musson had to come up with some other way to provide adequate drainage. Shutting off an allegedly inefficient system did not relieve Musson of their duty to maintain, at the very least, the same level of drainage of the inefficient system they had plugged. The contract did not require plugging, removing or leaving in place the system. Nor did the contract specify with any particularity the type of temporary system to be used, should the existing system be abandoned. These decisions were delegated to Musson.

Musson chose to use pumps as their temporary system. In addition to the temporary system not being implemented immediately, there are material issues of fact with respect to how many pumps were required for Musson to comply with their "maintain drainage" duty.. With a 24 inch storm sewer abandoned, there would have been a need for twenty-one, two-inch submersible pumps to maintain drainage in front of Showers' property.

(R.47.) Musson has stated what the pumping plan called for in terms of the number of pumps for the June 12 storm, but cannot say how many pumps actually made it on site and were operational. Furthermore, Musson admitted to not performing any sort of calculation with regards to the number of pumps that would have been necessary to maintain the same level of drainage of the system they had just removed.

(R.52; A.App.0010444.)

There is also the issue of the actual pumping plan and whether that satisfied drainage per the DOT Specifications. Neither the City nor Musson performed any calculations regarding the plan's capacity. Still, when the City instructed Musson to implement a pumping plan for its review, it created a reasonably

precise specification that Musson was required to conform to. Again, Musson has provided no evidence regarding any sort of compliance with the plan, except the plan itself. Showers' has provided several witnesses who state they saw no pumps. At the very least, there are material issues of fact as to whether or not the plan was implemented.

Also significant is the dispute on whether there was an agreement between the City, DOT and Musson's to approach the Project block-by-block. While the City, DOT and Musson all admit that the decision to approach the Project "block-by-block" was a "means and methods" issue. Musson is the only party that asserts the block-by-block approach was never agreed to. If Musson is correct, and this approach remained a means and method's issue, then Showers' previous argument that there was no reasonably precise specification is applicable. However, if there was an agreement, the agreement undoubtedly creates a reasonably precise specification, which, as shown, was not complied with.

While Schanhofer stated that the block-by-block approach was a means and methods decision, arguably implying there wasn't an enforceable agreement to

perform in that manner, the practical effect of Musson removing the entire road bed and storm sewer meant there was nothing the City could do, even if they were contractually able to intervene. It would not make economic or logical sense to force Musson to reinstall a storm system that would eventually be removed, or re-pave a section of road that would soon be torn up.

Musson was also required to take the necessary precautions before suspending work on any given day to prevent damage, traffic accidents, and provide for normal drainage. (R.52; A.App.00051.) For the reasons stated above, there is nothing in the record to suggest this was done. Musson also failed to stockpile the salvaged topsoil in a manner that precluded interference or obstruction of surface drainage (R.52; A.App.00056), a contributing cause of the damage to Petitioners' property.

Even if the contract is found to be reasonably precise, there is no evidence whatsoever that Musson, as a matter of law, conformed with the contract terms that could have prevented the damage to Showers' property. At the very least, since the evidence was

to be viewed in favor of the nonmoving party, Summary Judgment should not have been granted.

II. MUSSON HAD A MINISTERIAL DUTY TO MAINTAIN PROPER DRAINAGE ON THE CONSTRUCTION SITE.

The Court's analysis does not conclude with a decision that the Lyons test is satisfied. Assuming without conceding that Musson is entitled to immunity under Wis. Stat. § 894.80, Showers contends that Musson, by virtue of being an agent of the government, had a ministerial duty to maintain adequate drainage on the site at all times. The narrow determination for the Court is whether maintaining drainage during a total reconstruction constitutes a ministerial or discretionary function. If this duty is ministerial, Showers believes Musson's failure to maintain any level of drainage would constitute a failure to meet their ministerial duty, therefore providing an exception to contractor immunity.

Wis. Stat. § 893.80(4) confers immunity from suit on municipalities and their officers, agents, and employees. It states, in relevant part:

No suit may be brought against any
...governmental subdivision or any
agency thereof ...for acts done in

the exercise of **legislative,
quasi-legislative, judicial or
quasi-judicial functions.**

These acts have been collectively interpreted to include any act that involves the exercise of discretion and judgment. See Willow Creek ranch, LLC v. Town of Shelby, 2000 WI 56, ¶ 25, 235 Wis. 2d 409, 611 N.W.2d 693. When a party asserts § 893.80 immunity, the Court assumes negligence and focuses on whether the underlying action should be afforded immunity and if so, whether one of the judicially-created exceptions to immunity applies. 2002 WI 71, ¶ 17. Consequently, Musson has the burden of proving immunity. See Id., ¶ 22; Kimps v. Hill, 200 Wis. 2d 1, 11 n. 6, 546 N.W.2d 151 (1996).

An exception to immunity is found when a government agent has a ministerial duty to act in a certain circumstance. The Court must find a ministerial duty to exist when the duty is, "absolute certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing

remains for judgment or discretion". Kimps v. Hill, 200 Wis. 2d 1, 10-11, 546 N.W.2d 151 (1996).

A. The DOT Specifications Imposed a Ministerial Duty on Musson to Maintain Adequate Drainage

In Wisconsin, a ministerial duty is a duty that is imposed by law. In this context, law means an act of government, including statutes, administrative codes, policies, or orders, including contracts. See Meyers v. Schultz, 2004 WI App 234, ¶ 19, 277 Wis. 2d 845, 857, 690 N.W.2d 873, 879. While, under some circumstances, a government unit or its officers have discretion to determine the terms of a contract, once those terms are set and become part of the contract, the government unit and its officers are under a ministerial duty to comply. See Major v. County of Milwaukee, 196 Wis. 2d 939, 944-45, 539 N.W.2d 472, 474 (Ct. App. 1995).

The DOT Specifications provide, in at least three different sections, that the contractor "shall" maintain adequate drainage on the site at all times. While Musson may have had the discretion in determining how to comply with this duty, once they chose the use of pumps they had a ministerial duty to

provide the adequate number of pumps necessary to meet their contractual obligations. See Kierstyn v. Racine Unified Sch. Dist., 228 Wis. 2d 81, 93, 596 N.W.2d 417, 423 (1999) ("once public officers choose in their discretion to act, they are bound by a ministerial duty to act in a certain manner.") Musson has taken the position that there were at least "some pumps" (a disputed fact) on at least part of the .66 mile site, their duty has been met. However, Musson never made any calculations to determine the capacity of their drainage system to determine if it met the same level of drainage as the existing system. The only evidence in the record states that it did not.

In spite of the numerous provisions which require Musson to maintain adequate drainage, Musson failed to provide evidence that they had maintained **any** system of drainage once the storm sewer was removed. This was the case almost the entire duration of the Project, until the day of the storm. Further, when the pumping plan was created before the June 8 storm, the evidence (when viewed in favor of the nonmoving party) shows that it was never actually implemented. Finally, Musson did not even know they were required

to pump water, at least until two days before the storm, showing they never intended to comply with their contractual obligations.

B. Wisconsin Law States that the Maintenance of Storm Sewers is a Ministerial Duty.

In addition to the maintenance of drainage being a contractually mandated duty under the DOT specifications, Wisconsin case law states a municipality has an affirmative duty to maintain its sewer systems. It is true that Wisconsin Courts have consistently held that the acts of designing, planning and implementing a sewer system are discretionary acts protected under Wis. Stat. § 893.80(4). See Anhalt v. Cities and Vill. Mut. Ins. Co., 2001 WI App 271, 249 Wis. 2d 62, 637 N.W.2d 422; Allstate Ins. Co., v. Metropolitan Sewerage Comm. of the County of Milwaukee, 80 Wis. 2d 10, 258 N.W.2d 148 (1977).

However, while the decision to install a sewer system and the type of system is a discretionary,

“there is **no discretion** as to maintaining the system so as not to cause injury to residents. The actions of the City in operating and **maintaining** the sewer system do not fall within the immunity provisions of § 893.80.”

Menick v. City of Menasha, 200 Wis. 2d 737, 745, 547 N.W.2d 778 (Ct. App. 1996) (emphasis added).

This reading of Menick is consistent with Wisconsin case law regarding a municipality's ministerial duty to repair storm sewers that are in a state of disrepair. In Geuder, Paeschke & Frey Co. v. City of Milwaukee, 147 Wis. 491, 505, 133 N.W. 835 (1911), the Wisconsin Supreme Court held that

If a duly adopted and executed plan of sewage does not prove defective in operation while in a proper state of repair, but becomes out of repair to the knowledge, actual or constructive, of the municipality, the duty devolves upon it to remedy the matter, and it is liable for failure to exercise ordinary care in respect thereto.

Id.

The Wisconsin Supreme Court echoed this sentiment in Milwaukee Metro. Sewerage Dist. v. City of Milwaukee, 2005 WI 8, ¶¶ 61-62, 277 Wis. 2d 635, 679, 691 N.W.2d 658, 680, where it held that if it could be determined that a City was aware of a defective sewer system, the City could be found to have a ministerial duty to repair the system. The Wisconsin Court of Appeals recently applied this rationale, finding that a City had "the legal responsibility to maintain and operate" the sewage and storm water tunnel when it had

knowledge that the system was causing structural damage, but did not immediately remedy the problem. Bostco LLC v. Milwaukee Metro. Sewerage Dist., 2011 WI App 76, ¶¶ 36-37, 334 Wis. 2d 620, 643, 800 N.W.2d 518, 530 review granted, 339 Wis. 2d 734, 810 N.W.2d 221 (2012) and review granted, 339 Wis. 2d 740, 810 N.W.2d 225 (2012).

The Court of Appeals incorrectly dismissed Showers' argument that there was a ministerial duty to maintain drainage on site "[s]ince Musson was not involved in "maintaining" an existing system, but in building a new system." (A.App.00019.) While Musson was building a new system, this should not mean that they, or the City, were relieved of their obligations to maintain the existing system to the extent it was necessary to maintain drainage. It cannot be disputed that Musson and the City were well aware that the existing storm system was defective.

Once Musson plugged, capped, and removed the storm system, they knew the system was "defective". As the contract lays out, Musson was obligated to implement an adequate temporary system to maintain the same level of drainage as the old system. While there

are material issues of fact, when the evidence is viewed in the light most favorable to the nonmoving party, one may conclude that Musson did not implement a temporary system at all, let alone immediately after removing the existing system. The duty to maintain a sewer system does not arise when it rains, it is a constant duty that requires action immediately after a discovery the current system is defective. These are the type of facts that would have led the MMSD Court to conclude there was a ministerial duty to repair the storm sewer.

Unlike the Court of Appeals concluded, Menick does not stand for the idea that there is no duty to maintain a sewer system. Under the Court of Appeals decision in this case, once a municipality chooses to install a new storm sewer system, they may completely neglect the maintenance and drainage of the former system and site until after the Project is complete. This interpretation is against public policy. Showers has not argued that Musson had a duty to protect its property from a 100-year rain storm, but that Musson was obligated to provide the same level of drainage as the system they had removed. Had that been done, or

if the Ohio Street reconstruction had not taken place, the only evidence in the record states that Showers' property would not have flooded.

Applying the plain language of the test articulated in Kimps, Menick and MMSD, Musson had a ministerial duty to maintain an adequate drainage system when they chose to remove the storm sewer. The law imposes a duty to operate and maintain a storm sewer system already in place, even when installing a new system. The case law, and Musson's own decisions and knowledge show that Musson had an absolute duty involving the performance of a specific task, including its "time, mode and occasion" that nothing remained for discretion or judgment. Accordingly, Musson should not be granted governmental immunity.

CONCLUSION

Showers' respectfully request that the Wisconsin Supreme Court reverse the decisions of the Circuit Court of Winnebago County and Court of Appeals, which granted summary judgment to Musson and affirmed, respectively, and remand for a trial on Showers' claims for negligence.

Respectfully submitted this 13th day of December,
2012.

DEMPSEY LAW FIRM, LLP

Attorneys for Plaintiffs-
Appellants

By: s/ Daniel J. Posanski

Daniel J. Posanski

Member No. 1045352

Gerardo Medina Jr.

Member No. 1085890

CERTIFICATION OF FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8) (b), (d), and 809.62(4) for a brief produced with a proportional serif font. The length of this brief is 48 pages and 9,021 (exclusive of signatures). I further certify that the electronic copy of this brief is identical to the paper copy.

Dated this 13th day of December, 2012

By s/ Daniel J. Posanski

Daniel J. Posanski

Member No. 1045352

Gerardo Medina Jr.

Member No. 1085890

RECEIVED

12-14-2012

SUPREME COURT OF WISCONSIN

**CLERK OF SUPREME COURT
OF WISCONSIN**

MARK W. SHOWERS,
REAL MARKETING, LLC and
SHOWERS APPRAISALS, LLC,

Plaintiffs-Appellants-
Petitioners,

Appeal No.:
2011AP001158

-VS-

MUSSON BROS., INC, and
WEST BEND MUTUAL INSURANCE
COMPANY

Defendants-Respondents-
Cross-Appellants,

LEAGUE OF WISCONSIN
MUNICIPALITIES MUTUAL
INSURANCE and
CITY OF OSHKOSH,

Defendants-Cross-
Respondents.

APPENDIX

DEMPSEY LAW FIRM, LLP
Daniel J. Posanski, SBN 1045352
Gerardo Medina, Jr., SBN 1085890
1 Pearl Avenue, Suite 302
P.O. Box 886
Oshkosh, WI 54901
Phone: 920-235-7300
Fax: 920-235-2011

Attorneys for Plaintiffs-
Appellants-Petitioners

TABLE OF CONTENTS

APPENDIX OF PLAINTIFFS-APPELLANTS
APPEAL NO. 2011-AP-1158

	<u>Pages</u>
Court of Appeals Decision	A.App.00001-00023
Page Intentional Left Blank	A.App.00024
Order for Summary Judgment	A.App.00025-00026
Transcript of Proceedings, Oral Arguments and Decision, 3/18/2-11	A.App.00027-00033
State/Municipal Agreement For Highway Improvement	A.App.00034-00037
Highway Work Proposal	A.App.00038-00040
Wisconsin Department of Transportation Standard Specifications	A.App.00041-00056
Contract for Highway Work	A.App.00057-00058
Daily Diary Report, 4/3/2008	A.App.00059
Daily Diary Report, 4/14/2008	A.App.00060
Daily Diary Report, 4/16/2008	A.App.00061
Daily Diary Report, 4/23/2008	A.App.00062
Daily Diary Report, 4/25/2008	A.App.00063
Daily Diary Report, 4/29/2008	A.App.00064
Daily Diary Report, 5/7/2008	A.App.00065
Daily Diary Report, 5/12/2008	A.App.00066
Daily Diary Report, 5/13/2008	A.App.00067
Daily Inspection Report, 5/16/2008	A.App.00068
Daily Diary Report, 6/5/2008	A.App.00069
Daily Diary Report, 6/8/2008	A.App.00070

Daily Diary Report, 6/10/2008A.App.00071-00072
 Daily Diary Report, 6/11/2008A.App.00073
 Contingency Pumping Plan, 6/12/2008A.App.00074
 Daily Diary Report, 6/12/2008A.App.00075
 Daily Diary Report, 6/16/2008A.App.00076
 Daily Diary Report, 7/18/2008A.App.00077
 Daily Diary Report, 8/6/2008A.App.00078
 Daily Diary Report, 8/14/2008A.App.00079
 Ryan Schanhofer Deposition
 ExcerptsA.App.00080-00084
 Peter Gulbranson Deposition
 ExcerptsA.App.00085-00090
 Marc Miller Deposition
 ExcerptsA.App.00091-00095
 Mark P. Cornelius Deposition
 ExcerptsA.App.00096-00102
 Danny P. Muljo Deposition ExcerptsA.App.00103-00104
 Thomas J. Buchholz Deposition
 ExcerptsA.App.00105-00107
 Affidavit of Mark W. ShowersA.App.00108-00123
 Affidavit of
 Steven E. Kaiser, P.E.A.App.00124-00128
 Affidavit of Kathy MeiselA.App.00129-00130
 Affidavit of Patricia A. Binner.....A.App.00131-00132
 Affidavit of Randy ErtmerA.App.00133-00134
 CertificationA.App.00135-00136

2012 WI APP 80

**COURT OF APPEALS OF WISCONSIN
PUBLISHED OPINION**

Case No.: 2011AP1158

†Petition for review filed

Complete Title of Case:

**SHOWERS APPRAISALS, LLC, REAL MARKETING, LLC AND MARK W.
SHOWERS,**

PLAINTIFFS-APPELLANTS,†

v.

MUSSON BROS., INC. AND WEST BEND MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS,

**LEAGUE OF WISCONSIN MUNICIPALITIES MUTUAL INSURANCE AND
CITY OF OSHKOSH,**

DEFENDANTS-CROSS-RESPONDENTS.

Opinion Filed: June 27, 2012

Oral Argument: February 28, 2012

JUDGES: Brown, C.J., Neubauer, P.J., Reilly, J.

Concurred:

Dissented: Reilly, J.

Appellant

ATTORNEYS:

On behalf of the plaintiffs-appellants, the cause was submitted on the briefs of and oral argument by *Daniel J. Posanski* of *Dempsey Law Firm, LLP*, of Oshkosh.

Respondent

ATTORNEYS:

On behalf of the defendants-respondents-cross-appellants, the cause was submitted on the briefs of *David G. Dudas* and *Joseph P. Putzstuck* of

Mccanna, Dudas & Kewley, S.C., of Appleton. There was oral argument by *David G. Dudas*.

On behalf of the defendants-cross-respondents, the cause was submitted on the brief of *Richard J. Carlson* of *Silton Seifert Carlson, S.C.*, of Appleton. There was oral argument by *Bree A. Madison* of *Silton Seifert Carlson, S.C.*, of Appleton

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 27, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2011AP1158

Cir. Ct. No. 2009CV1438

STATE OF WISCONSIN

IN COURT OF APPEALS

**SHOWERS APPRAISALS, LLC, REAL MARKETING, LLC AND MARK W.
SHOWERS,**

PLAINTIFFS-APPELLANTS,

V.

MUSSON BROS., INC. AND WEST BEND MUTUAL INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS,

**LEAGUE OF WISCONSIN MUNICIPALITIES MUTUAL INSURANCE AND
CITY OF OSHKOSH,**

DEFENDANTS-CROSS-RESPONDENTS.

**APPEAL and CROSS-APPEAL from a judgment of the circuit court
for Winnebago County: BARBARA H. KEY, Judge. *Affirmed.***

Before Brown, C.J., Neubauer, P.J., Reilly, J.

¶1 BROWN, C.J. This case arises from the June 2008 floods in Oshkosh. Mark Showers and his businesses, Showers Appraisals, LLC, and Real Marketing, LLC, sued Musson Bros., Inc. and the City of Oshkosh for damages suffered in those floods. At the time of the storm, Musson was working as a private contractor for the State of Wisconsin to replace the storm sewer in front of Showers' building. Musson claimed, and the trial court agreed, that it is entitled to governmental immunity under *Estate of Lyons v. CNA Ins. Cos.*, 207 Wis. 2d 446, 457-58, 558 N.W.2d 658 (Ct. App. 1996), a case extending governmental immunity to independent contractors when certain conditions are met. Showers appeals as to Musson, and his primary argument is that because Musson was afforded some discretion in its implementation of contract provisions, *Lyons* should not shield it from liability. We disagree—*Lyons* and its progeny confirm that some discretion on the part of an independent contractor does not, in and of itself, destroy governmental immunity under *Lyons*. We affirm the trial court's grant of summary judgment in favor of Musson, and because of that, we need not address Musson's cross-appeal against the City.

BACKGROUND

¶2 We begin with an overview of the magnitude of the June 2008 storms in Oshkosh.¹ On June 8, 2008, Oshkosh received heavy rains, which the Oshkosh assistant director of public works described as a “25-year rainfall and flooding.” Four days later, on June 12, 2008, Oshkosh received 4.36 inches of rain over a period of six hours, or the equivalent of a seventy-five-year rain event. This case involves the flooding of Showers’ businesses during the June 12 rains. A map of flooding in Oshkosh that day indicates that many of Oshkosh’s streets were flooded as a result of the rains on June 12. The Oshkosh assistant director of public works explained that “[t]he City received complaints and reports of street and basement flooding ranging from where streets, storm sewer and sanitary sewer facilities had been recently constructed to where storm sewers and sanitary sewers were over 100 years old.” That is the situation that forms the backdrop of Showers’ negligence complaint.

¶3 Next, we outline the relationships between Musson, the department of transportation (DOT) and the City regarding the construction project that was in process outside Showers’ property when the storms hit. Musson signed a “contract for highway work” on January 9, 2008, which was later approved by the governor of Wisconsin and a DOT representative. The contract was for a project

¹ In his reply brief, Showers asserts that Musson did not raise the June 2008 rains as an affirmative defense in its answer to the complaint. He claims that “[s]ince Musson does not make a concise reference to these defenses, as a matter of law, the court must bar Musson’s arguments regarding storm sewer drainage capacity in Oshkosh, 75-year event, and Acts of God.” We disagree with that contention. Musson listed, as an affirmative defense, that “[p]laintiffs’ damages and losses, if any, are the result of ... intervening acts and/or superseding causes.” It then made reference to the rains in its motion for summary judgment and supporting affidavits. Showers has not explained why that is insufficient. Moreover, it would defy reason if we refused to acknowledge the magnitude of the storms. The significant event is, after all, the catalyst for what occurred.

to replace sanitary and sewer mains in an area that included Showers' property. Plans and specifications for the project were incorporated into the contract by the DOT. Musson was "solely responsible for the means, methods, techniques, sequences, and procedures of construction."

¶4 Once work on the project began, Ryan Schanhofer, a DOT engineer, was on site regularly and kept a daily log of issues related to the project. In addition, the DOT, Musson, and representatives of the City attended weekly meetings to discuss the project. Schanhofer's daily log shows that some disagreements arose between Musson, the City, and the DOT. The chief disagreement relevant to this appeal was regarding Musson's decision to disconnect the sewer for a large portion of the project all at once, rather than one or two blocks at a time. Musson's project manager, Mark Cornelius, testified that Musson decided to disconnect an entire road because on the first day of the project, the storm sewer had to be plugged at the river to prevent the river water from entering the project area via the storm sewer. So, according to Cornelius, whether the storm sewer was connected or not, pumps would have had to be used.

¶5 The City maintains that there was a prior unwritten understanding between the City, Musson and the DOT to go block-by-block. After the City discovered that Musson had disconnected a larger portion, it complained to the DOT, but was told that the decision was a means and methods decision within Musson's discretion. Ultimately, even with the decision to disconnect an entire road, Schanhofer and the DOT project manager assigned to the project testified that Musson met the contract specifications, particularly those related to drainage. Schanhofer additionally explained that if there had been a problem with contract compliance and he was aware of it, he would have had the power and

responsibility to intervene to ensure that the contractor came into compliance with the contract.

¶6 After the first wave of rain on June 8, 2008, and warnings of more to come, Musson worked with the City and the DOT to formulate a plan to handle the rain that was still on its way. The City provided Musson with maps and suggested pump locations, but was not involved in implementing the plan. Mark Miller, a City water maintenance employee, testified that he saw pumps up and running, but he did not know how many. In addition, on June 12, Schanhofer wrote in his daily log that he and at least two other people were going from location to location to observe the pumps. He observed the pumps to be working in the morning, with some problems in the afternoon as the rain continued. Showers, however, submitted several affidavits of witnesses who could not remember seeing pumps near his property, and Schanhofer acknowledged that there was no pump outside of Showers' property on June 13, 2008.

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

DISCUSSION

¶8 Before we get into the specific issues raised by Showers, we will provide a brief overview of governmental immunity law that is relevant to this case. WISCONSIN STAT. § 893.80(4) (2009-10)² states, in pertinent part,

No suit may be brought against any ... 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 ... 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.

In *Lyons*, we elaborated on the meaning of “agent” as used in § 893.80(4). See *Estate of Lyons*, 207 Wis. 2d at 457-58. We stated that an independent contractor who follows official directives is an agent entitled to governmental immunity when:

- (1) the governmental authority approved reasonably precise specifications;
- (2) the contractor’s actions conformed to those specifications; and
- (3) the contractor warned the supervising governmental authority about the possible dangers associated with those specifications that were known to the contractor but not to the governmental officials.

Id.

¶9 The analysis does not end even with a determination that the contractor is entitled to governmental immunity under *Lyons*. For example, our case law applying WIS. STAT. § 893.80(4) has differentiated between the

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

government's discretionary acts and its ministerial duties. *Willow Creek Ranch, LLC v. Town of Shelby*, 2000 WI 56, ¶¶25-27, 235 Wis. 2d 409, 611 N.W.2d 693. Discretionary acts are protected by the statute, but ministerial duties are not. *Id.* A ministerial duty is defined as 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." *Caraher v. City of Menomonie*, 2002 WI App 184, ¶18, 256 Wis. 2d 605, 649 N.W.2d 344 (citing *Lister v. Board of Regents*, 72 Wis. 2d 282, 301, 240 N.W.2d 610 (1976)). In some cases, a known and compelling danger may give rise to a ministerial duty, when the danger is of such force that the public officer has no discretion not to act in a particular way. See *Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, ¶¶43-45, 253 Wis. 2d 323, 646 N.W.2d 314.

¶10 In this appeal, Showers claims that Musson is not entitled to governmental immunity as an agent under *Lyons*, and that even if Musson meets the *Lyons* test, it is still not protected by governmental immunity because it had a ministerial duty to maintain drainage at the construction site, which it did not do. Alternatively, Showers argues that the June 8 rains created a situation where there was a known and compelling danger that gave rise to a ministerial duty. Thus, he argues that summary judgment should not have been granted as to Musson. Musson cross-appeals as to the City, arguing that if summary judgment is reversed as to Musson, it should be reversed as to the City as well. As we said at the outset, since we affirm summary judgment as to Musson, we need not address its cross-appeal.

¶11 We review summary judgments de novo, using the same methodology as the trial court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304,

315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). Showers' main issues in this appeal relate to whether WIS. STAT. § 893.80(4) applies, which is a question of law that we review de novo. See *Estate of Brown v. Mathy Const. Co.*, 2008 WI App 114, ¶6, 313 Wis. 2d 497, 756 N.W.2d 417. Showers also contends that there are a few factual disputes, which we will address in the context of his other arguments.

Independent contractor immunity—reasonably precise specifications

¶12 We first address whether Musson meets the *Lyons* immunity test. Showers focuses primarily on the first two prongs of the *Lyons* test—whether there were reasonably precise specifications and whether Musson followed them.³ In his brief, Showers actually conceded that the first *Lyons* prong was met since the contract contained reasonably precise specifications. However, at oral argument, he withdrew that concession, and we will not hold him to it.⁴ As we understand Showers' argument regarding the first prong, the contract did not contain "reasonably precise specifications" because too much discretion was afforded to Musson as to how to meet some of the more general contract provisions. That argument is based on the contract provision allowing Musson to

³ Showers also argues briefly that the third factor of the test set forth in *Estate of Lyons v. CNA Ins. Cos.*, 207 Wis. 2d 446, 457-58, 558 N.W.2d 658 (Ct. App. 1996) is not met. He states in a footnote that "[t]here is no evidence in the record that Musson warned any governmental authority about its concerns ... regarding the DOT Specifications; therefore, Appellants will prevail on [that] prong of the *Lyons* test." However, he does not develop that argument, other than two paragraphs in his reply brief, so we need not address it. See *M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

⁴ We suspect Showers withdrew his concession because our notice of oral argument contained questions that cast the issues in a different light from the briefs.

use whatever "means and methods" it thought appropriate to meet those provisions. Therefore, Showers claims that Musson falls outside the *Lyons* criteria because it was too independent from the State to be classified as an "agent."

¶13 The contract provisions which Showers believes to be problematic are as follows:

- (1) "The contractor is solely responsible for the means, methods, techniques, sequences, and procedures of construction."
- (2) "Before suspending the work, take the necessary precautions to prevent damage to the project, prevent traffic accidents, and provide for normal drainage."
- (3) "The contractor shall ... [c]onduct operations and maintain the work so that adequate drainage is provided at all times."
- (4) "If it is necessary in the prosecution of the work to interrupt existing surface drainage, sewers, or under drainage, provide temporary drainage until completing permanent drainage work."
- (5) "If storing salvaged topsoil on the right-of-way during construction operations, stockpile it to preclude interference with or obstruction of surface drainage."
- (6) "Preserve, protect and maintain all existing tile drains, sewers, and other subsurface drains, or parts thereof, that the engineer judges should continue in service without change."
- (7) "If the contractor damages or interrupts services, the contractor shall notify the utility promptly."
- (8) "Notify, in writing, all public and private property owners whose property interferes with the work. Advise them of the nature of the interference, and arrange with them for the disposition of the property."
- (9) "Use every reasonable precaution to prevent damage to all property including ... all underground structures including water or gas shut-off boxes, water meters, pipes, conduits, etc.; within or outside the right-of-way."

¶14 We begin by analyzing whether these provisions are “specifications” as that term is used in *Lyons*. One definition of “specification” is found in BLACK’S LAW DICTIONARY 1434 (8th ed. 2004): “[t]he act of making a detailed statement, esp[ecially] of the measurements, quality, materials, or other items to be provided under a contract.” If we were to use this definition, it would auger in Showers’ favor because it implies something more specific than the provisions at issue in this case. However, we did not use the term “specifications” in a vacuum when we wrote *Lyons*. Instead, we used a modifier to precede the word “specifications”—the term “reasonably precise.” *Estate of Lyons*, 207 Wis. 2d at 457 (emphasis added). This shows that exact direction to the contractor is not the hallmark of a specification.

¶15 Indeed, some flexibility in contract specifications is necessary and even desirable. In construction, for example, not everything can be foreseen and put into a contract that will define exactly how a contractor must respond to every situation. Instead, the owner of the project outlines certain bottom-line expectations that the contractor must make sure to adhere to. Those expectations create a framework through which everyone can operate when unexpected situations—such as the June 12 storm—make following the more detailed plan impossible or impractical. A “means and methods” clause like the one in Musson’s contract gives the contractor the discretion to operate within those expectations as it pleases. But that discretion is of course limited by the contract provisions. In such situations, a contractor working for the government does not lose immunity simply because it has to make some decisions on its own when an unplanned event or emergency situation arises.

¶16 Based on *Lyons*’ implicit recognition of the need for some flexibility in contract specifications, we think the definition in WEBSTER’S more accurately

captures what we said in *Lyons*. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2187 (1993). A "specification" is "a detailed, precise, explicit presentation (as by enumeration, description, or working drawing) of something *or* a plan or proposal for something." *Id.* (emphasis added). And when we view specifications in the WEBSTER's sense of the term—as "a plan or proposal for something"—then there is no question that the contract provisions highlighted by Showers are indeed specifications.

¶17 Thus, the only remaining issue is whether the standard specifications were reasonably precise. On that point, we agree with Showers to this extent: if a contractor is given so much discretion that it is not acting as an agent of the State but as a free agent acting without direction from the government, the first prong of *Lyons* would not be met. But we disagree with the principle that just because the contractor has some discretion in how to meet a desired specification outlined in the contract, *Lyons* immunity is lost as to that decision.

¶18 As we have explained in the past, any argument that the government has to have specifically mandated the act that constitutes the alleged negligence—here, the disconnection of the storm sewer—"misses the mark." *Estate of Brown*, 313 Wis. 2d 497, ¶¶10-11. In *Bronfeld v. Pember Cos., Inc.*, 2010 WI App 150, ¶¶28-29, 330 Wis. 2d 123, 792 N.W.2d 222, we addressed an argument that the government did not truly require the contractor in that case to follow the specifications in the contract because the contract itself delegated too much responsibility for safety (and therefore too much discretion) to the contractor. We responded to that argument by emphasizing that "the safety provisions the [plaintiffs] cite do not change the fact that [the contractor] was contractually obligated to follow the specifications in the project manual and traffic control

plan. By mandating that [the contractor] comply with these specifications, the City of River Falls curtailed [the contractor's] discretion." *Id.*, ¶29.

¶19 Based on the reasoning in *Bronfeld*, in a case such as this one, where the contractor and the government had to rely on general specifications because aspects of the more specific plan were not working, the focus of our inquiry is whether the government had genuine oversight of the project despite the contractor's apparent discretion. If the only specifications curtailing Musson's discretion in this case were the written specifications highlighted by Showers, Showers would have a much stronger argument. However, in addition to the written plans and specifications, the DOT was involved with the project on an ongoing basis with regular opportunities to give input and be involved in the decision-making process. And Schanhofer testified that if contract compliance had been at issue, he would have had to intervene. In addition to that testimony, the DOT's standard specifications explicitly state that the project engineer—in this case, Schanhofer—had the authority "to reject defective material and to suspend all work being improperly performed."

¶20 In other words, the DOT always had the power and responsibility to intervene if compliance with the contract was at issue. In this case, the standard specifications that applied to Musson's allegedly negligent methods, combined with the DOT's oversight of those methods, curtailed Musson's discretion. See *id.*, ¶¶28-29. It is that combination that convinces us that Musson was subject to reasonably precise specifications that satisfy the first prong of *Lyons*.

Independent contractor immunity—conformity with the government's reasonably precise specifications.

¶21 Showers spent the bulk of his brief addressing whether Musson met the DOT standard specifications we enumerated above. Much of Showers' argument on this issue involves general provisions—for example, to provide “adequate” drainage at all times, take “necessary” precautions to prevent damage and provide for “normal” drainage, and use “reasonable” precautions to prevent damage to property.⁵ Showers contends that his expert's affidavit establishes a genuine issue of material fact as to whether these general provisions were met, but we disagree. Showers' expert's opinion amounts to a criticism of how Musson and the City handled the storm, along with some explanations of techniques that might have worked better and allegations that Musson did not meet industry standards with regard to the project. The problem with that hindsight analysis is that it presumes that the DOT's standard specifications obligated Musson to

⁵ More specifically, we are referring to the following specifications: (1) Conduct operations and maintain the work so that adequate drainage is provided at all times; (2) Take the necessary precautions to prevent damage to the project, prevent traffic accidents, and provide for normal drainage; (3) Use every reasonable precaution to prevent damage to all property including all underground structures including water or gas shut-off boxes, water meters, pipes, conduits, etc., within or outside of the right-of-way; (4) Preserve, protect and maintain all existing tile drains, sewers, and other subsurface drains, or parts thereof, that the engineer judges should continue in service without change; and (5) If storing salvaged topsoil on the right-of-way during construction operations, stockpile it to preclude interference with or obstruction of surface drainage.

Of those, only the fifth—regarding stockpiling salvaged topsoil to preclude interference with surface drainage—is arguably concrete enough to lend itself to outside expert testimony that it was objectively not met. On that point, Showers' expert referred to a photograph taken June 13, 2008, and stated that “if it was [Musson's] intention to pump the water along Ohio Street for purposes of drainage ... those piles will clearly stop the flow of water.” However, the relevance of that opinion to determine whether the specification was met is premised on the assumption that to be successful, Musson had to stockpile any topsoil to preclude interference with drainage from the seventy-five-year rain that occurred on June 12. We simply do not believe that is the case, as we explain in the body of the opinion.

achieve the desired outcomes outlined in the DOT's standard specifications during a seventy-five-year rain event.

¶22 Our analysis of whether Musson met the DOT's reasonably precise specifications is framed by the purpose of that prong of the *Lyons* test—to “ensure that the challenged design is within the class of official decisions that should be insulated from judicial scrutiny and that the design feature being challenged was actually reflected upon by a governmental official.” *Estate of Lyons*, 207 Wis. 2d at 456-58. In other words, instead of focusing on whether Musson could have achieved better outcomes using different methods—which goes to its negligence—we must focus on whether it was following the reasonably precise specifications of the DOT when the alleged negligence occurred. *See Lodi*, 253 Wis. 2d 323, ¶17 (when analyzing an immunity defense, we assume negligence and focus instead on whether the action upon which liability is premised is entitled to immunity under the statute). And as with the first prong of the *Lyons* test, that analysis includes not only the written plans for the project, but the ongoing supervision and adjustments to those plans during the project. If Musson was following the DOT's plan at the time of the alleged negligence, as opposed to disregarding the DOT's instructions or acting without DOT oversight, then *Lyons* makes it immune from any negligence that resulted from following the plan.

¶23 Thus, we again look to the DOT's level of ongoing oversight and involvement in dealing with an evolving situation. The bottom line is that the DOT was regularly on site and kept a close eye on Musson's activities. Both Schanhofer and the DOT project manager, as well as Musson's own project manager, stated under oath that the contract specifications, including the maintenance of adequate drainage and other provisions cited by Showers, were followed. Showers' expert does not counter that testimony and therefore does not

create a genuine issue of material fact as to whether the reasonably precise specifications were followed.

¶24 Showers next argues that affidavits from people who were near his property on June 12 stating that they saw no pumps that day create a genuine issue of material fact as to whether adequate drainage was maintained according to the contract. We are not persuaded. No one has cited to the contingency plan that was in place for June 12 in the record, and we could not locate it. Because of that, we do not know where pumps should have been on that day relative to Showers' property. What we do know is that Schanhofer wrote in his daily log that he and others were at the project site on June 12 ensuring that pumping was happening according to the contingency plan. The fact that some witnesses who were not aware of the details of the contingency plan did not notice pumps in a particular location that day does not demonstrate that pumps were not where they should have been, or even that they may not have been there. The bottom line on this issue is that the contingency plan was made and implemented in concert with the DOT (and to some degree, the City), so *Lyons* applies.

¶25 Finally, Showers briefly alleges that there is a genuine issue of material fact as to whether block-by-block storm sewer disconnection was an agreed upon method of construction that became a reasonably precise specification Musson had to follow. We see no problem here. Although there is conflicting testimony as to whether the parties agreed at the beginning of the project to a block-by-block disconnection plan, it is undisputed that once Musson decided to do otherwise, the DOT stood by Musson's decision. It obviously did not believe Musson to be acting out of conformity with the contract because, not only did it not exercise its right to intercept such conduct, it told the City that the City had no power to act in this area.

¶26 We now move to the remaining, more concrete standard specifications that Showers alleges were not met. First, he complains that Musson did not provide evidence that it had “notified the storm water utility that it disrupted the storm sewer and had no other means for drainage.” We note up front that we have already concluded that Musson *did* provide alternative means for drainage through pumps. However, we also point out that the specification requiring notification of the utility provides that “[i]f the contractor damages or interrupts service, the contractor shall notify the utility promptly.” It then goes on to state that the contractor should “[c]oordinate and cooperate with the utility in the repair of the facility” and that “[t]he department will determine who is responsible for repair costs.” In context, it is clear that Musson was required to notify the utility if service was no longer being provided and Musson needed the utility’s assistance to reconnect it. It is not clear that Musson had to notify the utility if service was merely altered in a controlled fashion, as it was here with the pumping plan.

¶27 Showers also contends that Musson failed to “[n]otify, in writing, all public and private property owners whose property interferes with the work [and to a]dvise them of the nature of the interference, and arrange with them for the disposition of the property.” Showers argues that Musson failed to meet this specification when it did not notify Showers that the storm sewer servicing his property had been disconnected. We do not read this specification to require that action, however. There is no contention that Showers’ property in any way interfered with the project such that the contractor needed to arrange for the disposition of his property in light of the interference. We do not see how this specification applies with regard to Showers’ property.

Discretionary act versus ministerial duty

¶28 We next address Showers' claim that even if the *Lyons* test is met, Musson is not entitled to immunity because it had a ministerial duty to maintain a system of drainage, which is something it did not do. To support that argument, Showers relies on *Menick v. City of Menasha*, 200 Wis. 2d 737, 745, 547 N.W.2d 778 (Ct. App. 1996), which held that "while the decision to install and provide a sewer system in a community is a discretionary decision, there is no discretion as to maintaining the system so as not to cause injury to residents." Showers argues that *Menick*'s holding establishes Musson's ministerial duty to maintain the storm sewer in working order during construction.

¶29 *Menick* is totally inapplicable to this case. *Menick* explained how there was a difference between designing and building a public works system according to the design on the one hand, and maintaining the system once it was built. *Id.* Immunity is granted to the municipality for the former, but not the latter. *Id.* Since Musson was not involved in "maintaining" an existing system, but in building a new system, this is not a *Menick* case.

¶30 Lastly, we address Showers' related argument that the June 8 rains created a situation where there was a known and present danger that created a ministerial duty to act. In *Lodl*, our supreme court explained:

To pierce immunity pursuant to this exception, we must be able to conclude that the circumstances were sufficiently dangerous so as to give rise to a ministerial duty—not merely a generalized 'duty to act' in some unspecified way, but a duty to perform the particular act upon which liability is premised

Lodl, 253 Wis. 2d 323, ¶45. That is exactly what Showers cannot do. Although his argument that there was a known and present danger after the June 8 storm is persuasive, there is no evidence that the danger created a duty to act in a particular

way. Musson, the DOT, and the City had the discretion to decide how to address the danger—which is why this exception does not apply to remove Musson's immunity pursuant to *Lyons*.

¶31 Because we affirm summary judgment and need not address the cross-appeal, costs may be allowed against Showers under WIS. STAT. RULE 809.25(1)(a).

By the Court.—Judgment affirmed.

¶32 REILLY, J. (*dissenting*). This case is not about rain that fell in June 2008. This case is about *Lyons* being expanded to provide blanket immunity to all government contractors. *Lyons* properly held that government contractors are entitled to immunity for “certain tasks” for which they were given “reasonably precise specifications”; i.e., where the contractor *lacks* discretion in the performance of “certain tasks.” See *Estate of Lyons*, 207 Wis. 2d at 457. The majority expands *Lyons* so as to grant immunity for the discretionary acts (the “means and methods” of performance) of government contractors.

¶33 Musson requested immunity. As noted by the majority, case law dictates that when a party seeks immunity we assume for purposes of summary judgment that the party seeking immunity was negligent. See Majority op., ¶22. Musson bid and was awarded a \$4.3 million contract to reconstruct Wisconsin and Ohio Streets in Oshkosh. The contract provided that if Musson failed in providing temporary drainage during the performance of the contract that Musson would “be responsible for any damages to property or injury to persons occurring through their own negligence.” We start with the premise that Mark Showers incurred approximately \$140,000 in damages due to the flooding of his property caused by the negligence of Musson.

¶34 The majority acknowledged that the State, the City of Oshkosh, and Musson all had an “unwritten understanding” that Musson would disconnect the storm sewer on a block-by-block basis. *Id.*, ¶5. Musson later decided to rip out the entire storm sewer all at once rather than the agreed upon block-by-block method. The DOT conceded that Musson had the right to change the method of

construction, as it fell within the means and methods clause of the contract. *Id.* We also know that the State did not dictate how the storm sewer was to be removed, how many pumps Musson needed to have on hand, or where those pumps were to be located. Given that summary judgment was granted, we do not know why Musson deviated from the unwritten agreement regarding removal. Perhaps Musson saved costs by removing the entire storm sewer all at once. Musson may have decided to risk removal of the entire storm sewer against the risk that it might rain. Whatever the reason, Musson retained the contractual right—the means and methods—to gamble on the method of removal of the storm sewer. Musson remained, however, contractually obligated should its gamble fail. Until now.

¶35 I suspect the rationale for expanding immunity to the discretionary acts of government contractors is to obtain the lowest possible bids from contractors bidding for public works projects. The temporary bargain gained by lower bids from private contractors is paid for by Mark Showers and other good and virtuous citizens who will have to “take one for the team” and solely pay for the negligence of the government’s agent. Granting blanket immunity to government agents for their discretionary acts will encourage private contractors to base their bids upon minimal conditions, as the contractor will know that if a rainy day comes, or if a mistake is made in the means and methods of performing the contract, or if the contractor simply decides to cut corners on quality, someone else will pay for the contractor’s gambles and mistakes.

¶36 The policy question presented by this case is whether immunity for a private contractor’s discretionary acts is wise. I believe it is poor public policy to insulate (through immunity) government contractors from sloppy, negligent work. Musson should not be entitled to immunity as Musson was not restricted in its

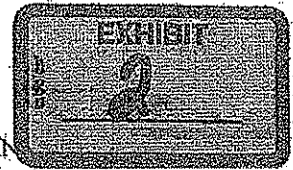
performance of the contract by a government imposed obligation to perform a certain task according to reasonably precise specifications—the situation *Lyons* is meant to apply to. Quite the opposite, Musson is being granted immunity in this case because Musson alone decided how a certain task was to be performed. While the means and methods provision in the contract grants Musson the right to perform in the manner it chooses, it also requires Musson to be responsible for damages caused by its negligent performance.

¶37 As I believe the majority has erred in its conclusion that discretionary acts of government contractors are entitled to immunity under *Lyons*, and as I believe the public policy of granting immunity to government contractors for their discretionary acts is counterproductive and will have severe and adverse consequences, I respectfully dissent. I would reverse and remand to the circuit court for a trial on whether Musson was negligent and, if so, whether it was a cause of Showers' damages.

STATE OF WISCONSIN

CIRCUIT COURT

WINNEBAGO COUNTY



SHOWERS APPRAISALS, LLC,
REAL MARKETING, LLC, and MARK W. SHOWERS,

Plaintiffs,

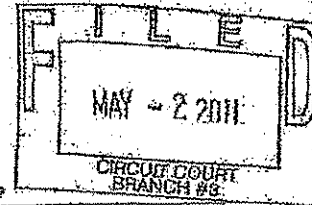
v.

CITY OF OSHKOSH, MUSSON BROS., INC.,
WEST BEND MUTUAL INS. CO. and LEAGUE
OF WISCONSIN MUNICIPALITIES MUTUAL INS.

Defendants.

Case No.: 09-CV-1438

Branch 3



ORDER FOR SUMMARY JUDGMENT

The hearing on the motions of Defendants, City of Oshkosh, Musson Brothers, Inc., West Bend Mutual Insurance Company, and League of Wisconsin Municipalities Mutual Insurance, for summary judgment was held before the Honorable Barbara Key on March 18, 2011.

The plaintiffs, Shower's Appraisals, LLC, Real Marketing, LLC and Mark W. Showers, appeared by their attorneys, Dempsey, Williamson, Kelly & Hertel, LLP, by Attorney Daniel J. Posanski; the defendants, City of Oshkosh and League of Municipalities Mutual Insurance Company, appeared by their attorneys, Sifton, Seifert & Carlson, S.C. by Attorney Richard J. Carlson; and the defendants, Musson Brothers, Inc. and West Bend Mutual Insurance Company, appeared by their attorneys, McCann, Dudas & Kewley, S.C. by Attorney David G. Dudas.

And the Court having heard argument on the matter, having reviewed all of the papers submitted by the parties in connection with the Motions for Summary Judgment filed by the defendants, and otherwise being fully familiar with this matter:

NOW, THEREFORE, IT IS HEREBY ORDERED: That Defendants, City of Oshkosh and League of Wisconsin Municipalities Mutual Insurance's Motion for Summary Judgment is granted.

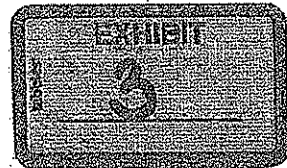
NOW, THEREFORE, IT IS HEREBY ORDERED: That Defendants, Musson Brothers, Inc. and West Bend Mutual Insurance Company's Motion for Summary Judgment is granted.

THIS IS A FINAL ORDER FOR PURPOSES OF APPEAL, AS DEFINED BY WIS. STAT. § 808.03(1).

Dated this 2 day of May, 2011.

BY THE COURT:


THE HONORABLE BARBARA KEY
Circuit Court Judge - Winnebago County



STATE OF WISCONSIN CIRCUIT COURT BRANCH III WINNEBAGO COUNTY

SHOWERS APPRAISALS, LLC,
REAL MARKETING, LLC and
MARK W. SHOWERS,

Case No. 09 CV 1438
ORAL ARGUMENTS

Plaintiffs,

-vs-

CITY OF OSHKOSH, MUSEON BROS., INC.,
WEST BEND MUTUAL INS. CO., and
LEAGUE OF WI MUNICIPALITIES MUTUAL INS.

Defendants.

* * *

TRANSCRIPT OF PROCEEDINGS

Friday, March 18, 2011

* * *

Transcript of Proceedings of the Oral Arguments had in
the above-captioned case heard on Friday, March 18, 2011
held in Circuit Court Branch III, the Honorable Barbara R.
Key presiding.

* * *

CATHERINE J. HARVER
OFFICIAL COURT REPORTER
BRANCH 3
415 JACKSON STREET
OSHKOSH, WI 54903

1 APPEARANCES:

2 On behalf of the Plaintiffs:

3 DANIEL J. POSANSKI, Attorney at Law

4 Dempsey, Williamson & Hertel, LLP, U.S. Bank Plaza, P.O. Box
5 886, Oshkosh, Wisconsin 54903-0886
67 On behalf of the Defendants, City of
8 Oshkosh and the League of WI Municipalities Mutual Insurance:

9 RICHARD J. CARLSON, Attorney at Law

10 Sifton, Seifert & Carlson, S.C., 331 East Washington Street,
11 Appleton, Wisconsin 54911
1213 On behalf of the Defendants, West Bend Mutual
14 Insurance Company and Musson Brothers, Inc.:

15 DAVID G. DUDAS, Attorney at Law

16 McCanna, Dudas & Kewley, S.C., 47 Park Place, Suite 700,
17 Appleton, Wisconsin 54912-1857
18
19
20
21
22
23
24
25

* * *

(Whereupon, at 9:59 a.m with the Court, counsel and the parties present, the proceedings were as follows:)

* * *

THE CLERK: Showers Appraisals, LLC, et al. versus City of Oshkosh, et al., 09 CV 1438.

THE COURT: Appearances.

MR. POSANSKI: Attorney Dan Posanski appearing on behalf of the Plaintiff, Showers Appraisals, LLC, Real Marketing, LLC and Mark W. Showers. Also in court today is the principal of Showers Appraisals, LLC and Real Marketing, LLC, Mark Showers, and also one of the co-owners of Showers Appraisals and Real Marketing, Luke Bruehler, is also behind me in the courtroom.

MR. DUDAS: Dave Dudas on behalf of Musson Brother, Inc. and West Bend Mutual Insurance Company, Your Honor.

MR. CARLSON: Richard Carlson on behalf of the City of Oshkosh and the League of Wisconsin Municipalities Insurance Company.

THE COURT: We're here and we have motions both brought by the City and Musson brothers. With that, who wishes to go first? Why don't we start with you, Mr. Carlson?

1 Mr. Dudas pronounced it differently. But that is the
2 fundamental building block of Wisconsin jurisprudence
3 for over 100 years on immunity. That it's a
4 discretionary decision.

5 Mr. Posanski's argument that, well, the City was
6 negligent because they didn't adequately address a known
7 danger. Nobody knew this storm event was going to be 75
8 years. These arguments are tail wagging the dog
9 arguments.

10 Nobody knew it was going to be a 75-year storm
11 event and nobody can accommodate a 75-year storm event
12 anywhere in any municipality. We are putting in new
13 stuff in less than 10 years.

14 THE COURT: You're repeating yourself.

15 Sorry. Anything else?

16 MR. CARLSON: No.

17 THE COURT: Mr. Dudas?

18 MR. DUDAS: No, Your Honor. Thank you.

19 THE COURT: In the end I think that's what
20 it comes down to is these were discretionary acts on the
21 part of the City in terms of what they had. This is a
22 case in which, I think, case law as to governmental
23 immunity does apply.

24 As to where they put the pumps, if they're going to
25 put the pumps there, in the end the discretion-- those

1 are discretionary acts that they made. At one point the
2 Court was wondering could this be ministerial in nature
3 but I don't think it is. I think it's discretionary in
4 the end. As such, the Court will find that there is
5 immunity as to the City.

6 As to Musson, they're acting under the
7 specifications of the DOT. This was something in which
8 there had been some warning as to the fact there was a
9 drainage problem. But, again, can there be any
10 anticipation of the type of flood that occurred here? I
11 have to agree.

12 I don't think it's one that there would be that
13 type of anticipation to warn of that danger but they did
14 give the warning as to potential problems here. I think
15 Lyons does apply. The Court will find that immunity
16 applies as well to Musson so both motions for summary
17 judgment will be granted.

18 Anything else?

19 MR. DUDAS: No, Your Honor.

20 MR. CARLSON: No, Your Honor.

21 THE COURT: Who is preparing the order? You
22 want to prepare it?

23 MR. DUDAS: Sure. Thank you.

24 THE COURT: Yep.

25 * * *

65

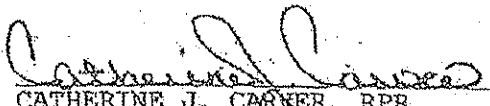
(Whereupon, at 11:29 a.m. this hearing was concluded.)

* * *

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I, CATHERINE J. CARVER, Court Reporter for Circuit Court Branch III, Winnebago County, Wisconsin, duly appointed therein, do hereby certify that the foregoing consisting of 66 pages, is a true and complete transcript as transcribed by me by Computer Aided Transcription of the proceedings conducted in that court on the 18th day of March, 2011, before the Honorable Barbara H. Key, Judge of said Court, and I do further certify that I was personally present in the courtroom during all of the said proceedings.


CATHERINE J. CARVER, RPR
Official Court Reporter
and Notary Public for the
State of Wisconsin,
Winnebago County

My Commission Expires:
January 15, 2012

15. 2009 10:56AM
 HIGHWAY IMPROVEMENT PROJECT

FILE NO. 4392.71 P. 14
 LENGTH: 1.0 mi
 LIMITS: South Park - Witzel Avenue
 COUNTY: Winnebago

The signatory City of Oshkosh hereinafter called the Municipality, through its undersigned duly authorized officers or officials, hereby requests the State of Wisconsin Department of Transportation, hereinafter called the State, to initiate and effect the highway or street improvement hereinafter described.

The authority for the Municipality to enter into this agreement with the State is provided by Section 86.25(1), (2), and (3) of the Statutes.

NEEDS AND ESTIMATE SUMMARY:

Existing Facility (describe and give reason for request): Existing Ohio Street was constructed in 1950 and the roadway is in need of reconstruction.

Proposed Improvement (nature of work): Replace existing Ohio Street with a new reconstructed roadway from South Park to Witzel.

Describe non-participating work included in the project contract: Sealing concrete joints, roadway sewer work, and installation of water main work.

Describe other work necessary to finish the project completely which will be undertaken independently by the Municipality: Finishing Real Estate and temporary interests needed for the project.

PHASE	Total Estimated Cost	ESTIMATED COST			
		Federal/State Funds	%	Municipal Funds	%
Real Estate (Participating): Acquisition	300,000	225,000	75	75,000	25
Construction (Participating): Category 010 - Roadway Costs	2,490,000	1,867,500	75%	622,500	25%
Category 020 - Concrete Pavement	645,000	466,410	75%	23,121	LS
Category 030 - Decorative Lighting	75,000			155,469	25%
Priority 1		35,000	50%	35,000	50%
Priority 2 - CSD Type 2					
Enhancements		5,000	100%	0	0%
Priority 3		0	0%	0	100%
SUBTOTAL:	3,510,000	2,598,910		911,090	
Construction (Non-Participating) Category 040 - Sanitary Sewer, Water Main Work, and Sealing Concrete Joints	785,000	0	0%	785,000	100%
TOTAL COST DISTRIBUTION:	4,295,000	2,598,910		1,696,090	

This request is subject to the terms and conditions that follow and is made by the undersigned under proper authority to make such a request for the designated Municipality and upon acceptance by the State shall constitute agreement between the Municipality and the State.

EXHIBIT

Signed for and in behalf of

City of Oshkosh

Municipality

09-12-2007

See page 28

Name

Title

Date

TERMS AND CONDITIONS:

1. The initiation and accomplishment of the improvement will be subject to the applicable Federal and State regulations.
2. The Municipality will pay to the State all costs incurred by the State in connection with the improvement which exceed Federal/State financing commitments or are ineligible for Federal/State financing.
3. Funding of each project phase (preliminary engineering, real estate, construction, and other) is subject to inclusion in an approved program. Federal aid and/or State transportation fund financing will be limited to participation in the costs of the following items as specified in the estimate summary:
 - a) The grading, base, pavement, and curb and gutter.
 - b) Catch basins and inlets for surface water drainage of the improvement with connections to the storm sewer main.
 - c) Construction engineering incidental to inspection and supervision of actual construction work.
 - d) Signing and pavement marking including detour routes.
 - e) Storm-Sewer mains necessary for the surface water drainage.
 - f) Construction or replacement of sidewalks and surfacing of private driveways.
 - g) New installations of or alteration of street lighting and traffic signals or devices.
4. Work necessary to complete the improvement to be financed entirely by the Municipality or other utility or facility owner includes the following items:
 - a) New installations of or alteration of sanitary sewers and connections, water, gas, electric, telephone telegraph, fire or police alarm facilities, parking meters, and similar utilities.
 - b) Conditioning, if required, and maintenance of detour routes.
 - c) Repair damages to roads or streets caused by reason of their use in hauling materials incidental to the improvement.
5. As the work progresses, the Municipality will be billed for work completed which is not chargeable to Federal / State funds. Upon completion of the project, a final audit will be made to determine the final division of costs.

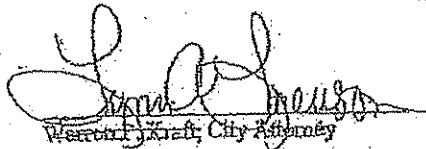
15. 2009 10:56AM

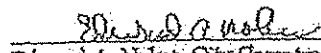
HL 4991 10:16

Signed for and in behalf of the City of Oaklawn


Richard A. Wollangk, City Manager


Pamela R. Ubrig, City Clerk


Warren J. Kraft, City Attorney


Edward A. Nokes, City Comptroller
I hereby certify that the necessary provisions
have been made to pay the liability which will
accrue under this contract.

15 2009-10:56AM

No 4392 P. 17

7. The work will be administered by the State and may include items not eligible for Federal / State participation.

8. The Municipality will at its own cost and expense:

a) Maintain all portions of the project that lie within its jurisdiction for such maintenance through statutory requirements in a manner satisfactory to the State and will make ample provision for such maintenance each year.

b) Regulate or prohibit all parking at locations where and when the pavement area usually occupied by parking vehicles will be needed to carry active traffic in the street.

9. Basis for Local Participation:

Real Estate - Real estate costs are eligible for Federal/State participation. Due to the amount of local traffic on Ohio Street, the City is responsible for 25% of the real estate costs. City is responsible for acquiring the real estate and can then apply for reimbursement of 75% of the costs. Real estate will be delivered by September 15, 2007.

Category 010 - City of Oshkosh is responsible for 25% of the roadway costs per WisDOT policy for Cost Share of capacity expansion project with local traffic on the project.

Category 020 -

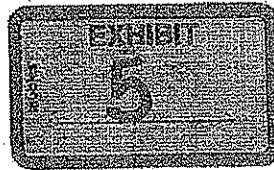
Non-Category Concrete Payment City Preference

The City is responsible for difference in life cycle costs of choosing concrete pavement versus asphalt pavement. Concrete pavement is \$43,001 more expensive based on total life cycle costs. Since the City is responsible for 25% of roadway costs already regardless of pavement choice, City will be billed \$23,121 L.S. for concrete pavement. From pavement design report, initial cost difference between asphalt & concrete is \$79,521. $25\%(\$79,521) = \$19,880$. $\$43,001 - \$19,880 = \$23,121$.

The remaining balance of Category 020 City of Oshkosh is responsible for 25% of concrete pavement costs similar to the roadway costs of category 010 per WisDOT policy.

Category 030 - Based on WisDOT policy, the City is 100% responsible for decorative lighting above the standard lighting which WisDOT participate in. WisDOT will participate first \$35,000 dollars of the category and will be Priority 1. Community Scenic Dollars (CSD) are also available to be used in decorative lighting. CSD dollars are capped at \$71,400 and will be priority 2. City of Oshkosh will be responsible for balance of category. \$35,000 is estimate of the WisDOT's share for 50% share of basic standard lighting.

Category 040 - The City is 100% responsible for the cost of installation of sanitary sewer, water main, and sealing concrete joints.



Proposal Number: 22

HIGHWAY WORK PROPOSAL

Wisconsin Department of Transportation
DT 1502 4/2004 s. 65.29(7) Wis. Stats.

COUNTY	STATE PROJECT ID	FEDERAL PROJECT ID	PROJECT DESCRIPTION	HIGHWAY
Winnebago	6110-15-73	STP 2007 639	Wisconsin Street, City of Oshkosh Witzel Avenue - Fox River Bridge	STH 44
Winnebago	6110-16-71	STP 2007 640	Ohio Street, City of Oshkosh South Park Avenue - Witzel Avenue	STH 44

ADDENDUM REQUIRED

ATTACHED AT BACK.

This proposal, submitted by the undersigned bidder to the Wisconsin Department of Transportation, is in accordance with the advertised request for proposals. The bidder is to furnish and deliver all materials, and to perform all work for the improvement of the designated project in the time specified, in accordance with the appended Proposal Requirements and Conditions.

Proposal Guaranty Required, \$ 100,000.00
Payable to: Wisconsin Department of Transportation
Bid Submittal Due

Date: December 11, 2007
Time (Local Time): 9:00 AM

Contract Completion Time

October 10, 2008

Assigned Departmental Bidder Employee Code

9%

Attach Proposal Guaranty on back of this PAGE.

Firm Name, Address, City, State, Zip Code

SAMPLE

NOT FOR BIDDING PURPOSES

This contract is subject to federal oversight.

This certifies that the undersigned bidder, duly sworn, is an authorized representative of the firm named above; that the bidder has examined and carefully prepared the bid from the plans, Highway Work Proposal, and all addenda, and has checked the same in detail before submitting this proposal or bid; and that the bidder or agents, officer, or employees have not, either directly or indirectly, entered into any agreement, participated in any collusion, or otherwise taken any action in violation of free competitive bidding in connection with this proposal bid.

Do not sign, notarize, or submit this Highway Work Proposal when submitting an electronic bid on the Internet.

Subscribed and sworn to before me this date _____

(Signature, Notary Public, State of Wisconsin)

(Bidder Signature)

(Print or Type Name, Notary Public, State Wisconsin)

(Print or Type Bidder Name)

(Date Commission Expires)

(Bidder Title)

Notary Seal

For Department Use Only

Work Item	Date Guaranty Returned
Concrete pavement removal, storm sewer, common excavation, base aggregate, concrete pavement, curb and gutter, sidewalk, street lighting, traffic signals, sanitary sewer, water lines.	
Notice of Award Dated	

The bidder declares that if they are awarded the contract, they will execute the contract agreement and begin and complete the work within the time named herein, and they will file a good and sufficient surety bond for the amount of the contract for performance and also for the full amount of the contract for payment.

The bidder, if awarded the contract, shall pay all claims as required by Section 779.14, Statutes of Wisconsin, and shall be subject to and discharge all liabilities for injuries pursuant to Chapter 102 of the Statutes of Wisconsin, and all acts amendatory thereto. They shall further be responsible for any damages to property or injury to persons occurring through their own negligence or that of their employees or agents, incident to the performance of work under this contract, pursuant to the Standard Specifications for Road and Bridge Construction applicable to this contract.

In connection with the performance of work under this contract, the contractor agrees to comply with all applicable state and federal statutes relating to non-discrimination in employment. No otherwise qualified person shall be excluded from employment or otherwise be subject to discrimination in employment in any manner on the basis of age, race, religion, color, gender, national origin or ancestry, disability, arrest or conviction record (in keeping with s.111.32), sexual orientation, marital status, membership in the military reserve, honesty testing, genetic testing, and outside use of lawful products. This provision shall include, but not be limited to the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation, and selection for training, including apprenticeship. The contractor further agrees to ensure equal opportunity in employment to all applicants and employees and to take affirmative action to attain a representative workforce.

The contractor agrees to post notices and posters setting forth the provisions of the nondiscrimination clause, in a conspicuous and easily accessible place, available for employees and applicants for employment.

If a state public official (section 19.42, Stats.) or an organization in which a state public official holds at least a 10% interest is a party to this agreement, this contract is voidable by the state unless appropriate disclosure is made to the State of Wisconsin Ethics Board.

SPECIAL PROVISIONS

1. General.

Perform the work under this construction contract for Project 6110-15-73, Wisconsin Street, City of Oshkosh, Witzel Avenue - Fox River Bridge, STH 44, and Project 6110-16-71, Ohio Street, City of Oshkosh, South Park Avenue - Witzel Avenue, STH 44, both projects in Winnebago County, Wisconsin as the plans show and execute the work as specified in the State of Wisconsin, Department of Transportation, Standard Specifications for Highway and Structure Construction, 2008 Edition, as published by the department, and these special provisions.

If all or a portion of the plans and special provisions are developed in the SI metric system and the schedule of prices is developed in the US standard measure system, the department will pay for the work as bid in the US standard system.
(090407) 100-005

2. Scope of Work.

The work under this contract shall consist of removing concrete pavement, storm sewer, common excavation, sanitary sewer, water main, irrigation system, base aggregate, concrete pavement, concrete curb and gutter, sidewalk, street lighting, traffic signals, landscaping, concrete pavers, C-70-0075, and all incidental items necessary to complete the work as shown on the plans and included in the proposal and contract.
(082003) 104-005

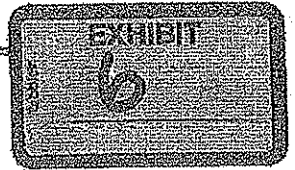
3. Definitions.

Add the following to the list of definitions in section 101.3 of the standard specifications:

The City of Oshkosh Specifications consist of the following sections:-

- Water Main Specifications (Sections DW 1 through DW 16; dated May 9, 2001)
- Sanitary Sewer Specifications (Sections DSA 1 through DSA 11; dated September 13, 2005)
- Technical Specifications (Sections TI 1 through TI 11; dated September 13, 2005)
- Storm Sewer Specifications (Sections DS 1 through DS 39; no date)
- Sewer and Water Laterals Specifications (Sections LS 1 through LS 11; no date)

The City of Oshkosh Specifications are available from:



Wisconsin Department of Transportation Standard Specifications

2008 Standard Specifications

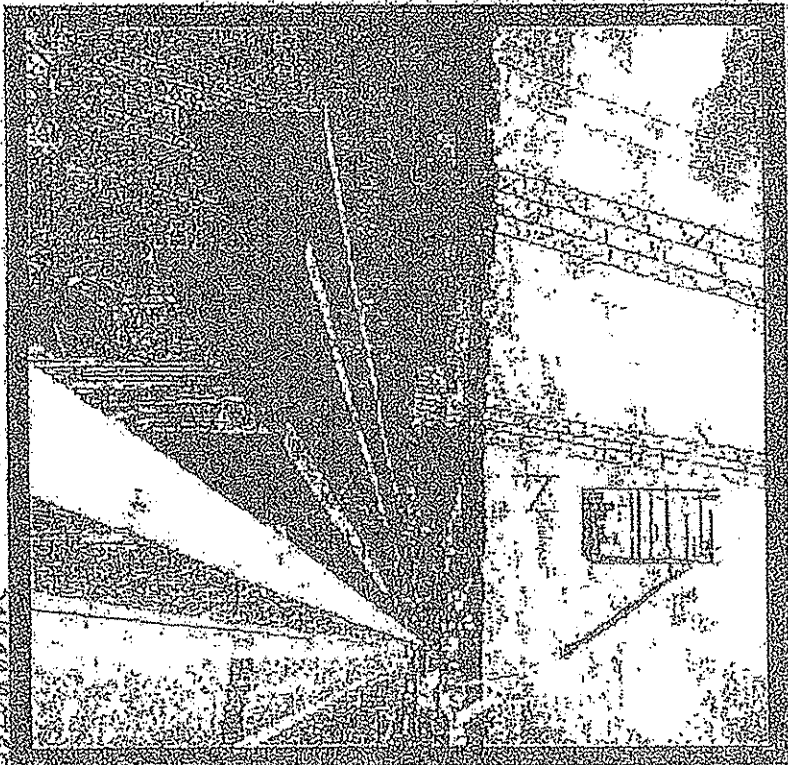
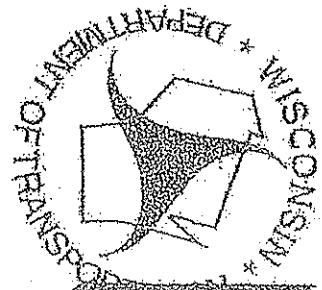
Changes since the 2006 edition are highlighted in red and a brief explanation of each change is provided both in the table of contents and adjacent to each revised passage.

Table of Contents

Bid Items

Index

Help



SECTION 104 SCOPE OF WORK

104.1 Intent of the Contract

- (1) The intent of the contract is to provide for the construction, execution, and completion of the work. Perform the work as specified in the contract.

104.2 Revisions to the Contract

104.2.1 General

- (1) The department reserves the right to revise the contract at any time. These revisions do not invalidate the contract or release the surety. The contractor agrees to complete the contract as revised. Do not proceed with the revised work without the engineer's prior written approval. Upon receiving written approval, proceed immediately with the revised work.
- (2) The contractor shall notify the engineer if the contractor believes a revision to the contract is necessary. Whenever the words notice, notification, or notify are used in 104.2 with reference to the contractor, the contractor shall provide notice as specified in 104.3. The engineer will determine if a potential contract revision is necessary and will inform the contractor of its determination in writing. The contractor must proceed with the engineer's direction.
- (3) If the engineer determines that a revision is necessary, the engineer will revise the contract time as specified in 108.10 and will revise the contract price as specified in 109.4. The contractor is entitled to no reimbursement for loss of anticipated profit.
- (4) If the engineer decides that a potential contract revision identified by the contractor is not necessary, and the contractor does not agree with the engineer's decision, the contractor may pursue a claim under 105.13.

104.2.2 Issuing Contract Change Orders

104.2.2.1 Change Orders for Extra Work

- (1) The department will issue a contract change order to accomplish extra work as defined in 101.3.

104.2.2.2 Change Orders for Differing Site Conditions

- (1) During the progress of the work, if one or more of the following differing conditions are encountered at the site, the party discovering the condition shall promptly notify the other party of the specific condition before further disturbing the site and before further performing the affected work.
 1. A subsurface or latent physical condition, differing materially from those indicated in the contract.
 2. An unknown physical condition of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the work specified in the contract.
- (2) If the contractor discovers the differing condition, the contractor shall provide oral notification as specified in 104.3.2, of the specific differing condition before further disturbing the site and before further performing the affected work.
- (3) The engineer will investigate the conditions. If the engineer determines that the conditions materially differ and cause an increase or decrease in the cost, time, or both, required to perform the work under the contract, the engineer will adjust the contract price, time, or both, and modify the contract in writing accordingly. The engineer will respond to the contractor as to whether or not an adjustment is warranted. The engineer will follow the contractor notification procedures specified in 104.3.
- (4) The department will not allow a contract adjustment unless the contractor has provided the required notice as specified in 104.3.

104.2.2.3 Change Orders for Engineer-Ordered Suspensions

- (1) If the engineer suspends or delays the performance of all or any portion of the work in writing for an unreasonable period of time (not originally anticipated, customary, or inherent to the construction industry) and the contractor believes that additional payment, contract time, or both, is due because of the suspension or delay, the contractor shall submit a written request for adjustment within 7 calendar days of receipt of the engineer's directive to resume work. Ensure that the content of the request conforms to 104.3.5.
- (2) The engineer will evaluate the contractor's request. If the engineer agrees that the cost, time, or both, required for the performance of the contract has increased due to the suspension or delay and the

suspension or delay was caused by conditions beyond the control of and not the fault of the contractor, its suppliers, or subcontractors at any approved tier, and not caused by weather, the engineer will make an adjustment and modify the contract in writing accordingly. The engineer will respond to the contractor as to whether or not an adjustment is warranted as specified in 104.3.6.

- (k) The engineer will not consider a contract adjustment unless the contractor submits the request for adjustment within the time specified above.
- (l) The engineer will not consider a contract adjustment under this clause to the extent that the performance would have been suspended by any other cause, or for which an adjustment is provided or excluded under any other term or condition of this contract.

104.2.2.4 Change Orders for Significant Changes in the Character of the Work

- (m) The department will adjust the contract if alterations or changes in quantities significantly change the character of the work under contract as follows:
 - 1. The character of the work as altered differs materially in kind or nature from that involved or included in the original proposed construction.
 - 2. The department or contractor demonstrates that quantity changes materially affect the character of the work and meet one of the following:
 - 2.1 The quantity of a major bid item, as defined in 101.3, is increased in excess of 125 percent or decreased below 75 percent of the original contract quantity. Any allowance for an increase in quantity applies only to that portion in excess of 125 percent of the original contract bid item quantity, or in case of a decrease below 75 percent, to the actual amount of work performed.
 - 2.2 The quantity of a minor bid item is increased to become a major bid item. An adjustment in the contract unit price for that bid item applies only to the quantity of that bid item having a contract value, determined from the contract unit price, in excess of 6.25 percent of the total amount of the original contract.
 - 2.3 The quantity of a minor bid item that is part of an approved subcontract and that exceeds 10 percent of the original value of that subcontract is decreased more than 50 percent from the original contract quantity for that bid item. Either party to the contract may submit a request for a revision to the contract unit price for that bid item. The department's total payment for the final reduced quantity will not exceed 75 percent of the original contract quantity at the contract price.
 - 2.4 The quantity of a minor bid item that is part of an approved subcontract and that exceeds 10 percent of the original value of that subcontract is increased more than 50 percent from the original contract quantity for that bid item and which as increased does not qualify for adjustment as a major bid item. Either party to the contract may submit a request to the other for a revision of the contract unit price for that quantity of the bid item that is in excess of 125 percent of the original contract quantity.
- (n) Before performing significantly changed work, reach agreement with the department concerning the basis for the adjustment as specified in 109.4.4. If the department does not acknowledge that the work has significantly changed, follow the notification procedures as specified in 104.3.
- (o) If the alterations or changes in quantities do not significantly change the character of the work under the contract, the department will pay for the altered work at the contract price.

104.2.2.5 Change Orders for Eliminated Bid Items

- (p) The department has the right to partially eliminate or completely eliminate a bid item the engineer finds to be unnecessary for the project. If the engineer partially eliminates or completely eliminates a bid item, the engineer will issue a contract change order for a fair and equitable amount as specified in 109.5.

104.2.2.6 Change Orders for Revisions to Contract Time

- (q) The department will issue a contract change order to revise the contract time as specified in 108.10.

104.3 Contractor Notification

104.3.1 General

- (r) Subsection 104.3 specifies the step-by-step communication process to be followed to expedite the resolution of potential contract revisions identified by the contractor. Both contractor actions and department responses are outlined. The contractor's non-compliance with the requirements of 104.3 may constitute a waiver of entitlement to a pay adjustment under 109.4 or a time extension under 108.10.

104.3.2 Contractor Initial Oral Notification

- (c) If required by 104.2, or if the contractor believes that the department's action, the department's lack of action, or some other situation results in or necessitates a contract revision, the contractor must promptly provide oral notification to the engineer. Upon notification, the engineer will attempt to resolve the identified issue.

104.3.3 Contractor 2-Day Written Notice

- (a) If the engineer has not resolved the identified issue within 2 business days after receipt of oral notification, provide a contractor 2-day written notice to the engineer. At a minimum, provide the following:
1. A written description of the nature of the issue.
 2. The time and date of discovering the problem or issue.
 3. If appropriate, the location of the issue.

- (b) The contractor is encouraged to provide the additional information specified in 104.3.5 as early as possible to assist the engineer in the timely resolution of an identified issue. The engineer will not require, in subsequent submissions, duplication of information already provided.

104.3.4 Engineer One-Day Written Acknowledgment

- (a) Within one business day after the contractor provides initial written notice, the engineer will provide an engineer one-day written acknowledgment to the contractor. The engineer will continue to resolve the issue.

104.3.5 Contractor 5-Day Written Statement

- (a) If the engineer has not resolved the issue within 5 business days from the date of the initial written notice, augment the original written notice with an additional contractor 5-day written statement to resolve the issue. In the written statement:
1. State why the issue is a change to the original contract.
 2. Refer to the contract to show what has changed from the original contract.
 3. Provide all perceived adjustments to contract prices, delivery schedules, phasing, and contract time.
 4. Provide an estimate of the time within which the department must respond to the notice to minimize cost, delay, or disruption.

- (b) The department understands that the contractor's estimates of the time required and additional costs may be based on incomplete information. The department will attempt to comprehend and resolve the potential change as quickly as possible. The contractor can help the department in this process by providing the requested information as quickly as possible.

104.3.6 Engineer 5-Day Written Response

- (a) Within 5 business days after receiving the contractor 5-day written statement, the engineer will consider the statement and provide an engineer 5-day response in writing to the contractor with one or more of the following responses:
1. The engineer will confirm that a contract change order is necessary as specified in 104.2. The engineer will give direction concerning the potential change.
 2. The engineer will deny that the contract has to be revised. The engineer will provide a statement as to why the issue is not a change to the contract. At a minimum, the engineer will respond to the contractor's issues and refer to the contract to show why the issues are not a change from the original contract.
 3. The engineer will request additional information to allow the engineer to decide whether item one or 2 of 104.3.6(1) applies. The engineer will state the information needed and date it is to be received for further review.
- (b) Once the contractor believes that the engineer has no further basis to request additional information as described in item 3 of 104.3.6(1) or disagrees with the engineer's decision in item 2 of 104.3.6(1), the contractor may pursue a claim as specified in 105.13.

104.4 (Vacant)

104.5 (Vacant)

104.6 Roadway Maintenance and Traffic Control

104.6.1 General

SECTION 105 CONTROL OF THE WORK

105.1 Engineer's Authority

(a) The engineer decides all questions regarding:

1. Interpretation of the contract.
2. The quantity, quality, and acceptability of materials furnished and work performed.
3. Rate of progress of the work.
4. Payment, contract administration, and the acceptable fulfillment of the contract.
5. Disputes.
6. Mutual rights under the contract.

(a) The engineer may suspend the work in writing for any reason at any time during the contract. Except as specified in 104.2.2.3 for engineer-ordered suspensions, the department will allow no additional payment or time extension due to a suspension of work.

(a) The engineer will determine the estimated quantities for progress payments as specified in 109.6.

105.2 Supplemental Plans and Drawings

(a) Submit to the engineer supplements to the approved contract plans, shop drawings, and the computations necessary to control the work. Do not change the approved contract plans without the engineer's written authorization.

(a) If sufficient detail is not provided on the structure plans produced by the department, submit to the engineer plans, shop drawings, and the computations required to successfully prosecute the work.

(a) If required in the contract, submit plans for temporary structures, cribs, cofferdams, falsework, shoring, and form work. Ensure that these plans and accompanying drawings and computations are signed and sealed by a registered professional engineer.

(a) Include a transmittal letter with each submittal made under 105.2. Indicate on shop drawings all deviations from the contract drawings and itemize these deviations in the transmittal letter. The department will file and may review these submittals. The department's review does not relieve the contractor of the responsibility for obtaining satisfactory results, for the accuracy of dimensions and details, or for conformity of these drawings with the contract. The contractor may begin work on associated items without the department's review.

(a) Include the cost of furnishing all shop drawings in the unit price for one or more associated bid item.

105.3 Conformity with the Contract

105.3.1 General

(a) Perform all work the contract specifies. Produce quality work within limits of precision reasonably expected of good construction. Produce work conforming to the lines, grades, cross-sections, dimensions, and material requirements the contract specifies or the engineer establishes. Monitor construction operations to identify potential unacceptable work as defined in 101.3. Promptly remove and replace, or otherwise correct, unacceptable work at no expense to the department.

(a) The contractor may request a plan dimension change between US standard and SI metric dimensions for a portion of the work. The engineer will only consider this dimension change if the modified work is essentially equivalent to the specified work. The department will pay for this modified work as specified in item 4 of 109.1.1.1(2). Do not proceed with the modified work without the engineer's written permission.

(a) The contract may specify specific values with allowable tolerances, ranges, minimums, or maximums. Control operations to produce work that falls within the specified tolerance or range, falls above a specified minimum, or falls below a specified maximum. If the contract does not specify a tolerance, range, minimum, or maximum value, control operations to produce work conforming to the contract within accepted manufacturing or construction industry standards.

(a) The contract may specify standard manufactured items such as fences, wire, plates, rolled shapes, pipe, conduit, etc. If these items are identified by gauge, unit weight, section, dimensions, etc., these identifications are nominal weights or dimensions.

105.3.2 Nonconforming Work

105.3.2.1 Engineer-Accepted Nonconforming Work

- m If the work does not conform to the contract, the engineer will determine the circumstances under which that nonconforming work may be accepted and allowed to remain in place. The engineer will document the basis of acceptance and may execute a contract change order to adjust the contract unit prices for the nonconforming work. If the contract does not specify a price adjustment, the engineer may adjust the price.

105.3.2.2 Unacceptable Work

- n The engineer will issue a written order to remove and replace or otherwise correct nonconforming work that the engineer deems unacceptable, as defined in 101.3. If the contractor does not comply with the engineer's written order, the engineer may effect a remedy and deduct the cost from payments due the contractor.

105.3.2.3 Unauthorized Work

- m Unauthorized work is work performed as follows:

1. Without the lines and grades being given.
2. Beyond the lines and grades the contract shows or the engineer provides.
3. Without the engineer's prior approval.
4. After the inspector has temporarily suspended the work in writing as specified in 105.8.
5. In violation of a written direction the engineer issues.

- n The department may elect to not measure or pay for unauthorized work. The engineer may issue a written directive to remove unauthorized work at no expense to the department. If the contractor does not comply with the engineer's written directive, the engineer may remove unauthorized work and deduct the cost from payments due the contractor.

105.4 Coordination of the Contract Documents

- m All documents included under the definition of contract in 101.3 are essential parts of the contract. A requirement occurring in one is binding as though occurring in all. These documents provide for and describe the complete contract. These documents are available to the contractor at no cost.
- n During the progress of the work, the contractor may request that the engineer interpret or provide information relative to the contract.

Revise 105.4(3) to delete references to supplemental specifications. Beginning with this 2008 edition the Standard Specifications will be published annually.

- m If there is a discrepancy between documents, the governing order is as follows:

1. Addenda.
2. Special Provisions.
3. Plans.
4. Additional Special Provisions.
5. Standard Specifications.

- n If there is a discrepancy on a drawing, the drawing dimensions, unless obviously incorrect, govern over scaled dimensions. If there is a discrepancy in the plans, the typical sections or details govern over the standard detail drawings.

- n Neither the contractor nor the department may take advantage of an apparent error or omission in the contract. Inform the engineer immediately as specified in 104.3 upon discovering an error or omission. The engineer will offer an interpretation and make the necessary corrections.

105.5 Coordination with the Contractor

105.5.1 Contractor Obligations

- m Give the work the constant attention necessary to promote the progress of the work. Promptly supply the materials, tools, plant, equipment, labor, and incidental items required to perform the work.
- n Cooperate with the engineer and with third parties engaged upon or near the work. If the department grants a third party a permit to do utility work, the engineer may issue a change order directing the

contractor to make or repair required roadway openings. The department will pay the contractor as specified in 104.2 for extra work.

- (a) Maintain one copy each of the plans and specifications at the site of work at all times. The engineer will supply the contractor with copies of the contract. If the department has electronically computed estimated grading quantities, the department will furnish that information to the contractor upon request.
- (b) Supervise and direct the work competently and efficiently. Devote the attention and apply the expertise necessary to perform the work as the contract specifies. Monitor the work in progress to ensure that the work conforms to the contract. The contractor is solely responsible for the means, methods, techniques, sequences, and procedures of construction. The contractor is not responsible for the negligence of others in the design or specification of specific means, methods, techniques, sequences, or procedures of construction described in and expressly required by the contract.
- (c) Employ a competent superintendent or designate a representative capable of reading and understanding the contract and experienced in the type of work being performed. The superintendent or designated representative shall be the authorized agent of the contractor and shall have full authority to execute the engineer's directions or instructions without delay. Ensure that the superintendent or designated representative is on the project or accessible to the engineer during all hours of each work day. Notify the engineer promptly when replacing the superintendent or designated representative.

105.5.2 Cooperation Between Contractors

- (a) The department may, at any time, contract for or perform other work on or near the work covered by the contract. Cooperate with other contractors engaged upon or near the work.
- (b) The contractor shall, or the engineer may, direct the contractor to:
 1. Schedule and conduct the work to avoid interference with the operations of other contractors engaged upon or near the work.
 2. Perform the work in the proper sequence in relation to that of other work in the area.
 3. Join the work to that of others in a manner consistent with accepted manufacturing or construction industry practices.
 4. Conduct operations and maintain the work so that adequate drainage is provided at all times.

- (c) The contractor is responsible for damage done by the contractor or the contractor's agents to work performed by other contractors. The engineer will resolve disputes between 2 or more contractors, engaged upon or near the work, regarding the rights of each under their respective contracts.

105.6 Construction Staking

105.6.1 General

- (a) The department is responsible for errors or discrepancies found in previous department surveys, plans, specifications, special provisions, or work constructed under other department contracts. The department will pay for further studies and redesign required due to these errors or discrepancies.
- (b) The department will furnish and set original horizontal and vertical control points. Prosecute the work using these points for field control. Maintain all required stakes and marks. The department will deduct from payment due the contractor, \$100 per hour for the cost of the work required to replace engineer's stakes or marks destroyed or disturbed. The department will administer this deduction under the Replacing Construction Stakes administrative item.
- (c) The engineer and contractor shall agree on the meaning of all stakes, measurements, and marks before the contractor begins work.

105.6.2 Department Performed Staking

- (a) The department will perform the staking required to lay out and construct the work except for the staking required under section 650 for the individual construction staking bid items the contract includes.
- (b) The department is responsible for the accuracy of lines, slopes, and grades it provides under 105.6.2.
- (c) During construction, the contractor may submit requests for staking to the engineer. The department is responsible for staking delays only if the engineer receives that request at least 72 hours before related work begins.

105.6.3 Contractor Performed Staking

- (i) In addition to department provided staking, furnish and set the following:
 1. Additional staking or markings that might be needed to support the contractor's specific method of operations.
 2. Staking required under section 650 to lay out and construct the work for the individual construction staking bid items the contract includes.
- (ii) The contractor is responsible for the accuracy of lines, slopes, and grades the contractor provides. Construct the work conforming to the lines, grades, cross sections, and dimensions the contract specifies or the engineer establishes.
- (iii) Notify the engineer immediately when finding errors or discrepancies in previous surveys, plans, specifications, special provisions, or work constructed under other contracts. Suspend related operations until the engineer gives approval to proceed.
- (iv) The engineer may check the control of work, as established by the contractor, at any time. The engineer will provide the results of these checks to the contractor, but by doing so in no way relieves the contractor of the responsibility for the accuracy of their layout work.
- (v) Correct or replace deficient layout and construction work resulting from:
 1. Inaccuracies in the contractor's staking operations.
 2. Not reporting inaccuracies found in work done by the department or by others.

- (vi) If, due to the inaccuracies in 105.6.3(5), the department is required to make further studies, redesign, or both, the department will deduct all expenses incurred from the payment due the contractor.

105.7 Authority and Duties of Project Engineer

- (i) As the engineer's direct representative, the project engineer has immediate charge of the engineering details of each construction project. The project engineer is responsible for field administration of the project. The engineer authorizes the project engineer to reject defective material and to suspend all work being improperly performed. The engineer may delegate additional authority, granted under 105.1, to the project engineer.

105.8 Authority and Duties of Inspectors

- (i) As the engineer's authorized representatives, inspectors may inspect all work done and all materials furnished.
- (ii) The department authorizes inspectors to:
 1. Call the contractor's attention to work or materials that do not conform to the contract.
 2. Reject materials until the engineer is notified and decides all questions at issue.
 3. Temporarily suspend work, in writing, until the engineer is notified and decides all questions at issue.
- (iii) The department does not authorize inspectors to do the following unless the engineer specifically delegates:
 1. Revoke, alter, or waive any requirements of the contract.
 2. Approve or accept any portion of the completed project.
 3. Act as foreperson or perform other duties for the contractor.
- (iv) The engineer may delegate additional authority to the inspector.

105.9 Inspecting Work

- (i) The engineer may inspect, at any time, all materials and all parts of the work. This inspection may include the preparation, fabrication, or manufacture of materials or components on or off the project site. Allow the engineer safe access to all parts of the work. Furnish the information and assistance needed to make a complete inspection.
- (ii) If the engineer requests, uncover or remove portions of finished work for inspection. After inspection, restore that work to the contract requirements. If the department finds the work acceptable, the department will pay for uncovering, removing, and restoring that work as extra work. If the department finds the work unacceptable, the contractor shall pay for uncovering, removing, and restoring that work.
- (iii) Failure to reject defective work or materials does not prevent the department from rejecting defective work once it is discovered.

SECTION 107. LEGAL RELATIONS AND RESPONSIBILITY TO THE PUBLIC

107.1 Laws to be Observed

- (a) At all times, observe and comply with all applicable federal and state laws and administrative rules, codes, local laws, ordinances, and regulations that affect the conduct of the work, and applicable orders or decrees of bodies or tribunals having jurisdiction or authority over the work. The department will consider no plea of misunderstanding or ignorance thereof. The contractor shall indemnify and save harmless the state and all of its officers, agents, and employees against any claim of liability arising from or based on the violation of any applicable law, ordinance, regulation, order, or decree, whether by the contractor or the contractor's employees, subcontractors, or agents.
- (b) Comply with all applicable federal, state, and local health official rules and regulations governing safety, health, and sanitation. Provide all necessary safeguards, safety devices, and protective equipment. Take all other actions that are reasonably necessary to protect the life and health of employees on the project and the safety of the public.

107.2 Haul Road Notification

- (a) Notify the engineer in writing at least 3 business days before hauling project materials over a public road or street not a part of the state trunk highway system. The department will subsequently survey the existing condition of that haul route to establish a baseline for assessing damage that the contractor's hauling operations might cause.

107.3 Permits and Licensing

- (a) Procure all permits and licenses, pay all charges and fees, and give all notices necessary to perform the work. The contractor shall comply with all permit requirements whether the permit is issued to the contractor, the state, or the maintaining authority.

107.4 Patented Devices, Materials, and Processes

- (a) Include in the bid prices royalties and costs arising from patents, trademarks, and copyrights. Before using a design, device, material, or process covered by letters, patents, or copyrights, provide for its use by suitable legal agreement with the patentee or owners. Provide proof of this agreement with the engineer if necessary. The contractor and the contractor's surety shall provide indemnification from all claims for infringement of patents, trademarks, or copyrights as specified in 107.12.

107.5 Labor Compliance

- (a) Comply with all contract labor compliance provisions and take responsibility for subcontractor and lower tier subcontractor compliance. Submit department-requested documentation within the time the department specifies in a written notice. Resolve all labor compliance issues within 90 days after receiving the department's first written notice. The department and the contractor can mutually agree to extend this 90-day requirement. Actively pursue resolution of contract labor compliance issues and attend all contract labor compliance meetings and hearings.

107.6 Federal Participation.

- (a) If the federal government participates in the cost of the contract:
 1. The work is subject to the inspection and approval of the proper officials of the federal government.
 2. The work shall conform to the applicable federal statutes, rules, and regulations.
- (b) The federal government is not a party to the contract and will not interfere with the rights of either party under the contract.

107.7 (Vacant)

107.8 Public Convenience and Safety

- (a) Maintain the safety of the traveling public and control traffic using barricades, warning signs, and flaggers as specified in 104.6.1.
- (b) If the contract provides that the road or portions of the road are closed to public traffic during construction, the engineer may direct or authorize the contractor to open sections of the road to public traffic before the work is completed as specified in 104.6.5.
- (c) When hauling materials on public roads or streets, equip vehicles subject to spillage with tailgates and adequate sideboards. Use covers and other protective devices necessary to prevent spillage. The

contractor is responsible for removing spillage from the entire area within the right-of-way of the haul route. Immediately remove spillage that interferes with or creates a hazard for traffic.

- (4) Notify the responsible fire department and police department at least 24 hours before closing a road, street, or highway.
- (5) If excavating adjacent to a building or wall, give the property owner sufficient written notice of the impending excavation. The contractor and the contractor's surety shall hold the state and the municipality in which the work is done harmless from damage to the building or wall.
- (6) Check for and comply with local ordinances governing the hours for operation of construction equipment. Obtain the engineer's written approval for operations from 10:00 P.M. until 6:00 A.M.

107.9 Contractor's Use of the Highway Right-of-Way

- (1) The department has sole authority to grant the contractor permission to occupy and use the right-of-way. All activity within the right-of-way is subject to the engineer's approval.
- (2) If the engineer allows, the contractor may store materials and equipment or place the plant on portions of the right-of-way not required for public travel. Do not park vehicles or equipment not in immediate use, store materials, or create obstructions that may unduly distract motorists travelling through construction areas. Minimize hazards to motorists, pedestrians, and workers.

107.10 Use of Explosives

- (1) Observe the utmost care when using explosives so as not to endanger life and property. Use, store, and handle explosives and highly inflammable materials conforming to applicable federal, state, and local laws and regulations including the rules of the Wisconsin department of commerce.

107.11 Protecting and Restoring Property

107.11.1 General

- (1) Notify, in writing, all public and private property owners whose property interferes with the work. Advise them of the nature of the interference, and arrange with them for the disposition of the property. Upon request, furnish the engineer with copies of all notifications and final agreements.
- (2) Use every reasonable precaution to prevent damage to all property including poles, trees, shrubbery, crops, and fences adjacent to or interfering with the work; all overhead structures including wires, cables, etc.; and all underground structures including water or gas shut-off boxes, water meters, pipes, conduits, etc.; within or outside the right-of-way.
- (3) Assume liability for all damage to public or private property resulting from contractor operations, defective work or materials, or non-execution of the contract. Restore property, to a condition similar or equal to that existing before causing the damage, as the engineer directs or in a manner acceptable to the property owner. If the contractor fails to restore property within a reasonable time, the department may, upon 48 hours written notice, restore that property as the engineer deems necessary. The department will deduct restoration costs from payments due the contractor under the contract.

107.11.2 Freeway Traffic Management Systems

- (1) If the contractor's operations interrupt FTMS service, notify the engineer immediately and take the action required to restore service within 24 hours. Repair damaged facilities to the condition existing before interruption. If the contractor does not restore service within 24 hours, the department may restore service and deduct restoration costs from payments due the contractor under the contract.

107.11.3 Property Marks

- (1) Protect and carefully preserve all known property and survey marks and land monuments, and notify the engineer of the nature and location of these markers. Do not disturb or destroy markers until the engineer has arranged for their referencing or perpetuation.

107.11.4 Burning

- (1) Do not start fires without first securing the necessary permits and the approval of the local authority having jurisdiction, or the county forest ranger, or the WDNR bureau of forestry. Comply with applicable requirements of the WDNR's air pollution control rules, including the limitations on open burning. When burning brush, stumps, or rubbish, take care not to damage standing trees, shrubs, or other property. Assume liability for all damage caused by fires.

107.12 Responsibility for Damage and Tort Claims

- (a) The contractor and the contractor's insurer shall defend, indemnify, and save harmless the following entities:
1. The state, its officers, agents, and employees. In this context, agents exclude consulting firms, Wisconsin counties and municipalities, and their respective officers and employees.
 2. The county, town, or municipality in which the improvement is made, each of them separately or jointly, and their officers, agents, and employees.
- (a) Defend, indemnify, and save harmless all entities in 107.12(1) from all suits, actions, or claims of any character brought because of one or more of the following:
1. Injuries or damages received or sustained by a person, persons, or property resulting from the contractor's operations.
 2. Neglect in safeguarding the work.
 3. Use of unacceptable materials in constructing the work.
 4. Acts or omissions, neglect, or misconduct of the contractor.
 5. Claims or amounts recovered for an infringement by the contractor of patent, trademark, or copyright.
 6. Claims or amounts arising or recovered under the workers compensation act, relating to the contractor's employees.
 7. The contractor's noncompliance with a law, ordinance, order, or decree relating to the contract.
- (a) The department may retain payments due the contractor in amounts sufficient to cover the cost of suits, actions, or claims caused by the reasons specified in 107.12(2). The department will not release this retainage until the contractor furnishes satisfactory evidence of one of the following:
1. The contractor is adequately protected from the suits, actions, or claims with the insurance coverages specified in 107.26 or other insurance.
 2. The parties have settled the suits, actions, or claims.
- (a) The state is not liable to the contractor for damages or delays resulting from third party work, except for excusable delays as specified in 108.10.2 and 108.10.3. The state also is exempt from liability to the contractor for damages or delays resulting from injunctions or other restraining orders obtained by third parties except where the damage or delay is a direct result of an injunction or restraining order obtained by a citizen's action alleging violations of 42 U.S.C. 4331-4332, 28 U.S.C. 138, or public law 91-646.
- #### 107.13 Third Party Beneficiary
- (a) This contract does not create anyone as a third party beneficiary. This contract does not authorize non-parties to the contract to maintain actions for damages under the contract.
- #### 107.14 Contractor's Responsibility for Work
- (a) Until the engineer accepts the work as specified in 105.11 the contractor shall maintain charge and care of the work except as specified in 104.6. Within 107.14, the term "work" is redefined to mean "the work product that is completed in its final position and is incorporated in the project." Protect all of the work against injury or damage caused by the action of the elements, or from any other cause, whether arising from the execution or non-execution of the work. Rebuild, repair, restore, and make good all injuries or damages to any portion of the work occasioned by the above causes at no additional cost to the department.
- (a) The contractor shall not bear the expense for damage to the work caused by abnormal and unforeseeable occurrences beyond the control of, and without the fault or negligence of, the contractor. These abnormal and unforeseeable occurrences include but are not limited to the following:
1. Cataclysmic phenomena of nature.
 2. Acts of the public enemy.
 3. Acts of government authorities.
- (a) Before suspending the work, take the necessary precautions to prevent damage to the project, prevent traffic accidents, and provide for normal drainage. Erect necessary temporary barricades, signs, or other facilities at no expense to the department except as specified in 104.6.
- (a) The contractor is responsible for all damages to equipment and supplies regardless of the circumstances.

107.15 Personal Liability of Public Officials

- (a) In carrying out contract provisions, or in exercising power or authority granted to them by or within the scope of the contract, the department, the engineer, or their authorized representatives have no liability, either personally or as officials of the state, in all of these matters, they act solely as agents and representatives of the state. The contractor waives all rights of action against the department, its agents, or employees.

107.16 No Waiver of Legal Rights

- (a) The department may correct a measure, estimate, or certificate at any time before or after final acceptance. The department may recover from the contractor, surety, or both, overpayments upheld for a breach (failure to fulfill contract obligations). A waiver on the part of the department of a breach of a part of the contract is not a waiver of another or subsequent breach.
- (a) The following department actions do not waive the department's rights or power under the contract:
 - 1. Payment for or acceptance of all or portions of the work.
 - 2. Extension of contract time.
 - 3. Possession of the work.

- (a) Assume liability for latent defects, fraud, gross mistakes as may amount to fraud, or as regards to the department's rights under a warranty or guaranty without prejudice to the terms of the contract.

107.17 Railroad-Highway Grade Separations and Approaches, New Railroad Crossings, and Operations on Railroad Right-of-Way

107.17.1 General

- (a) The railroad's chief engineering officer may inspect the work and contractor operations on grade separations and their approaches, grade crossings, or on railroad right-of-way. Perform the work in a manner satisfactory to the railroad's chief engineering officer.
- (a) Perform all work within the railroad's right-of-way in a manner that does not interfere with the safe and uninterrupted operation of railroad traffic. Maintain clearances during construction as follows:
 - 1. Do not operate equipment closer than 25 feet (7.6 m) horizontally from a track centerline or 22 feet (6.7 m) vertically above the top of a rail, except under the protection of railroad flaggers.
 - 2. Do not store materials or equipment closer than 25 feet (7.6 m) horizontally from a track centerline.
 - 3. Provide an obstruction-free work zone adjacent to a track extending 12 feet (3.6 m) or more horizontally on both sides of the track centerline. Keep this work zone free of construction debris.
 - 4. Unless the railroad's chief engineering officer approves otherwise in writing, maintain minimum clearances from falsework, forms, shoring, and other temporary fixed objects as follows:
 - 4.1 Provide 12 feet (3.6 m), plus 1.5 inches (38 mm) per degree of track curvature, measured horizontally from the track centerline.
 - 4.2 Provide 21 feet (6.4 m), plus compensation for super-elevated track, measured vertically above the top of the highest rail.
- (a) Comply with the railroad's rules and regulations regarding operations on railroad right-of-way. If the railroad's chief engineering officer requires, arrange with the railroad to obtain the services of qualified railroad employees to protect railroad traffic through the work. Bear the cost of these services and make payment directly to the railroad. Notify the railroad's chief engineering officer in writing at least 3 business days before starting work near a track. Provide the specific time planned to start the operations.
- (a) Do not blast on the railroad's right-of-way without the written permission of the railroad's chief engineering officer. At least 3 business days before blasting, inform the responsible railroad official if explosives will be detonated within 100 yards (91 m) of a track. Provide specific dates, times, and locations for all blasting.
- (a) Develop shop drawings, with detailed plans and computations, for the following temporary construction:
 - 1. Falsework and forms of highway structures spanning a track.
 - 2. Forms for piers and abutments adjacent to a track.
 - 3. Shoring, if the contract requires shoring of an excavation near a track.

- (c) Have a registered professional engineer sign and seal the shop drawings. At least 30 calendar days before starting falsework, form, or shoring construction, submit 3 sets of shop drawings to the railroad's chief engineering officer and one set to the engineer. The engineer and the railroad may review the shop drawings. If the engineer or the railroad finds the shop drawings unsatisfactory, the contractor shall make the required changes. A satisfactory shop drawing review does not relieve the contractor of responsibility and liability for the structural integrity and proper functioning of the falsework, forms, or shoring.
- (d) Make all necessary arrangements for crossing a railroad's track at a location other than an existing public crossing. Bear all costs incident to that crossing, including flagging costs.

107.17.2 Work by Railroad

- (a) The railroad company may undertake certain work or operations incident to the project that are the subject of an agreement between the department and the railroad company. Do not alter this work without the consent of the railroad company. Should the railroad company elect to have contractor-requested alterations made with railroad company forces, the contractor shall bear the cost of the alterations and make payment directly to the railroad company.
- (b) Bear the cost of the movement or adjustment of telegraph, telephone, or signal facilities owned, operated, or maintained by the railroad company and not otherwise provided for in the contract or in agreements between the department and the railroad company.

107.17.3 Railroad Insurance Requirements

- (a) If required by the special provisions, provide or arrange for a subcontractor to provide railroad protective liability insurance in addition to the types and limits of insurance required in 107.26. Keep railroad protective liability insurance coverage in force until completing all work, under or incidental to the contract, on the railroad right-of-way or premises of the railroad and until the department has accepted the work as specified in 105.11.2.4.
- (b) Provide railroad protective liability insurance coverage written as specified in 23 CFR part 646 subpart A. Provide a separate policy for each railroad owning tracks on the project. Ensure that the railroad protective liability insurance policies provide the following minimum limits of coverage:
 1. Coverage A, bodily injury liability and property damage liability; \$2 million per occurrence.
 2. Coverage B, physical damage to property liability; \$2 million per occurrence.
 3. An annual aggregate amount of \$6 million that shall apply separately to each policy renewal or extension.
- (c) Submit the following to each railroad owning tracks on the project as evidence of that railroad's respective coverage:
 1. A certificate of insurance for the types and limits of insurance specified in 107.26.
 2. The railroad protective liability insurance policy or other acceptable documentation to the railroad company.
- (d) Submit the following to the region as evidence of the required coverage:
 1. A copy of the letter to the railroad company transmitting the submittal documents specified in 107.17.3(3).
 2. A certificate of insurance for the required railroad protective liability coverages.
- (e) The contractor shall not begin work on the right-of-way or premises of the railroad company until the region receives the submittals specified in 107.17.3(4) and notification from the railroad company that the contractor has provided sufficient insurance information to begin work.
- (f) Notify the department at least 60 calendar days before a cancellation or material change in coverage. Only obtain coverage from insurance companies licensed to do business in Wisconsin that have an A.M. Best rating of A- or better. The cost of providing the required insurance coverage and limits is incidental to the contract. The department will make no additional or special payment for providing insurance.

107.18 Environmental Protection

Revise 107.18(f) to reference invasive species and pathogens that may be introduced or spread by construction operations in waterways. Department and contractor field staffs should be aware that on April 4, 2007 the Natural Resources Board adopted Order FH-22-07(E) to control the spread of the Viral Hemorrhagic Septicemia (VHS) virus in Wisconsin. This emergency rule requires special action by contractors working in selected waterways. Contact the department's regional environmental coordinator to determine your project is subject to this rule.

107.20 Erosion Control

- (1) Perform the temporary and permanent erosion control measures and the storm water management measures required by Trans 401 of the Wisconsin administrative code, the contract, and as the engineer directs.
- (2) Coordinate temporary erosion control measures with the permanent erosion control measures to ensure economical, effective, and continuous erosion control.
- (3) Prepare and submit an ECIP for the project, including borrow sites and material disposal sites, according to Trans 401 of the Wisconsin administrative code. Perform the work according to the ECIP.
- (4) The engineer may limit the area of erosive land that the contractor may expose to the elements by grubbing, excavation, borrow, or fill operations at any one time. Provide the shortest duration that is practical for this exposure before final trimming, finishing, and seeding, or application of temporary erosion control measures.
- (5) Perform construction in and adjacent to rivers, streams, lakes, or other waterways in a manner to avoid washing, sloughing, or deposition of materials into the waterways that would obstruct or impair the flow of the waterways and thus endanger the roadway or stream banks, or that would result in undue or avoidable contamination, pollution, or siltation of these waterways.
- (6) The engineer has full authority to suspend or limit grading and other operations pending adequate performance of permanent erosion control measures, such as finish grading, topsoiling, mulching, matting, and seeding, and all temporary erosion control measures that the engineer orders.
- (7) Perform grubbing and grading operations in sequence with other work to minimize erosion. Construct intercepting ditches or dikes as soon as it is practical after completing clearing and grubbing operations and before or during the operations of excavating the cuts. Where erosion is likely to be a problem, provide the permanent erosion control measures immediately after performing grading operations, unless the engineer authorizes temporary erosion control measures.
- (8) Except as limited by §28.4.1.1 and §28.5.1 for borrow sites and material disposal sites, the engineer will measure, and the department will pay for, temporary and permanent erosion control as provided for by the various contract bid items or as extra work, if this work is not specified in the contract. However, the department will not pay for this work if the engineer requires temporary erosion control because of the contractor's negligence, carelessness, or failure to install permanent controls.

107.21 Use of Fire Hydrants

- (1) If the contractor desires to use water from public hydrants, the contractor shall make application to the proper authorities and shall conform to their ordinances, rules, and regulations concerning fire hydrant use.
- (2) Ensure that fire hydrants are accessible at all times to the fire department. Do not place material or other obstructions closer to a fire hydrant than allowed by ordinances, rules, or regulations, or within 5 feet (1.5 m) of a fire hydrant in the absence of specific ordinances, rules, or regulations.

107.22 Contractor's Responsibility for Utility Facilities, Property, and Services

- (1) The department expressly reserves for the proper authorities of the municipality in which the work is done the right to construct utility services in the highway or street, or to grant permits for the same, at any time. Coordinate and cooperate with utilities in the removal and rearrangement of existing facilities to minimize their service interruption and duplication of work by the utilities. At least 3 business days before breaking ground, the contractor shall notify the proper utility authorities that the contractor's operations may affect their facilities including: streets, gas and water pipes, electric and other conduits, railroads, poles, manholes, catch basins, sewers, and other property. Never hinder or interfere with utility representatives in the protection or operation of their facilities. Obtain all necessary information regarding existing facilities. Protect existing facilities from damage and unnecessary exposure.
- (2) Obtain all necessary information regarding the planned installation of new facilities identified in the contract. Make proper provision and give proper notification so the utilities can install new facilities at the proper time without delay or unnecessary inconvenience. Do not pave over the location of a new underground facility, planned for installation concurrently with this contract, before installing the facility.
- (3) If the contractor damages or interrupts service, the contractor shall notify the utility promptly. Coordinate and cooperate with the utility in the repair of the facility. The department will determine who is responsible for repair costs as specified in Wisconsin statutes §§.0831 and 102.0175(2).

SECTION 205 ROADWAY AND DRAINAGE EXCAVATION

205.1 Description

- a) This section describes excavating and disposing of material taken from within the right-of-way for project construction.
- b) This section does not include material obtained from borrow pits outside the right-of-way limits, excavation for structures, or other excavation that separate bid items and specific measurement and payment are specified elsewhere in the specifications and contract.

205.2 Materials

205.2.1 Classification

- a) The department classifies excavation as common, rock, stone piles and stone fences, or marsh excavation. If the contract contains the Excavation Common and Excavation Rock bid items, the engineer will classify that excavation as either common or rock, based on unfrozen material, as the contractor performs the work.
- b) The department classifies all EBS outside of marshes as common or rock.

205.2.2 Common Excavation

- a) Under the Excavation Common bid item, excavate all materials not classified as rock, stone piles and stone fences, or marsh excavation. For contracts without the Excavation Rock bid item, remove boulders having volumes of one cubic yard (1 m^3) or more under the Excavation Common bid item.

205.2.3 Rock Excavation

- a) Under the Excavation Rock bid item, excavate all hard, solid rock in ledges, bedded deposits, and unstratified masses, and all conglomerate deposits or any other material so firmly cemented they present all the characteristics of solid rock, and the engineer determines it is not practical to excavate this material without blasting or using rippers. Rock excavation also includes removing all rock boulders having a volume of one cubic yard (1 m^3) or more.
- b) The classification of rock excavation does not apply to crushed aggregate or asphaltic base or surface courses, or to portland cement base or surface courses.

205.2.4 Stone Piles and Stone Fences

- a) Under the Excavation Stone Piles and Stone Fences bid item, remove and dispose of stones, boulders, and rock fragments found assembled on the right-of-way in piles so that the engineer can make collective measurements by volume of the weight. If the contract includes a bid for this bid item, the classification is applicable to all portions of the piles or assembled stone masses found on the right-of-way that are removed and disposed of as specified. This applies regardless of whether this material occurs entirely above or partially below the ground surface. Do not classify stones in groups or piles of less than one cubic yard (1 m^3) in volume under stone piles and stone fences.

205.2.5 Marsh Excavation

- a) Under the Excavation Marsh bid item, perform all required excavation below the original ground level of marshes and swamps underlying proposed embankments, within the limits indicated on the plans or as the engineer determines, and necessary or desirable to ensure a stable foundation for embankment or to accelerate the subsidence of unstable material under embankment load. If old road embankment cores are encountered in areas involving marsh excavation, salvage the portions of old road cores as designated on the plans and use them in the construction of embankments. This bid item also includes all material of whatever nature encountered below the original ground elevations in areas designated for this work, exclusive of portions of old road cores designated for salvage and used in construction of embankments.
- b) On contracts containing the Excavation Marsh bid item, excavate any marsh areas not indicated on the plans but encountered during construction as marsh excavation if the engineer orders removing these areas.

205.3 Construction

205.3.1 General

- (1) Excavate materials as the plans show or the engineer allows from within the right-of-way. Use excavated material in the work to the extent that it is practical. Use excavated material with suitable engineering properties to construct the roadway, roadbed, embankments, earth subgrade and shoulders, intersections, side ditches and dikes, channels, and waterways. Dispose of surplus or unsuitable material as specified in 205.3.12.
- (2) Grade entrances, approaches, ditches, and channels beyond the right-of-way.
- (3) Unless specified otherwise, remove and dispose of surface and base, embankment surcharge, masonry walls, foundations of buildings, or other miscellaneous structures that lie within the right-of-way. Also, remove and dispose of stone, fences, stone piles, and surplus and unsuitable materials.
- (4) Replace unsuitable material with satisfactory material. Trim and finish the roadway. Maintain the work done under section 205 in a finished condition until acceptance.

205.3.2 Preparing Roadway Foundation

Revise 205.3.2(f) to explicitly specify removal of all frozen material.

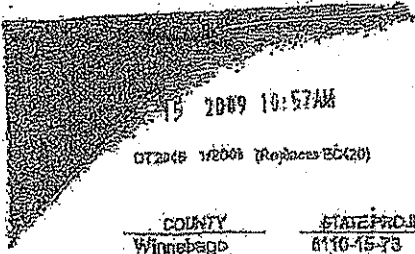
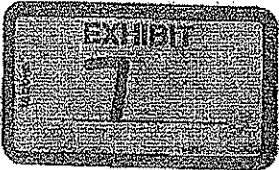
- (1) Remove vegetation taller than one foot (300 mm) before excavating or placing embankment. Remove heavy sod, perishable material, unstable topsoil, muck, peat, and other undesirable material from the roadway foundation as defined in 101.3. Also remove frozen material from the roadway foundation unless the engineer approves otherwise. Dispose of removed material as specified in 206.3.12 unless the contract or the engineer directs otherwise.
- (2) Salvage topsoil, as specified in 205.3.2, from excavation areas and the roadway foundation. Remove excess unstable topsoil from the roadway foundation as EBS as specified in 205.3.4.
- (3) Compact, or prepare otherwise as required, the existing ground within the roadway foundation as necessary to support the embankment and attain the specified embankment density.
- (4) If placing embankment on side slopes 10 feet (3 m) high or higher and steeper than one vertical to 3 horizontal, provide vertically faced horizontal steps or benches in the slopes to support the embankment. The contractor may cut or form the steps or benches while placing the embankment.
- (5) Completely remove all pavement, asphaltic surface, and rigid base from within the roadbed slopes and underlying proposed embankments to a depth of 2 feet (0.6 m) or more below the finished grade line, or to the depth the plans show.

205.3.3 Drainage During Construction

- (1) During construction, maintain roadway, ditches, and channels in a well-drained condition at all times by keeping the excavation areas and embankments sloped to the approximate section of the ultimate earth grade. Perform blading or leveling operations when placing embankments and during the process of excavation except if the excavation is in ledge rock or areas where leveling is not practical or necessary. If it is necessary in the prosecution of the work to interrupt existing surface drainage, sewers, or under drainage, provide temporary drainage until completing permanent drainage work.
- (2) If storing salvaged topsoil on the right-of-way during construction operations, stockpile it to preclude interference with or obstruction of surface drainage.
- (3) Seal subgrade surfaces as specified for subgrade intermediate consolidation and trimming in 207.3.9.
- (4) Preserve, protect and maintain all existing tile drains, sewers, and other subsurface drains, or parts thereof, that the engineer judges should continue in service without change. Repair, at no expense to the department, all damage to these facilities resulting from negligence or carelessness of the contractor's operations.

205.3.4 Excavation Below Subgrade

- (1) Remove deposits of frost-heave material, unstable silty soils, wet and unstable soil, material salvaged from old road cores in marshes, topsoil containing considerable amounts of humus or vegetable matter, rocks, or other undesirable foundation material to the depth below finished grade as the plans show or the engineer directs. If possible, slope and drain the excavation bottoms to prevent water accumulation.
- (2) Dispose of humus bearing soils and other excavated materials not suitable for embankment construction as specified for disposal of surplus or unsuitable material in 205.3.12.



15 2009 10:57AM

No. 4392 P. 15

OT2008 1/2008 (Replaces EC20)

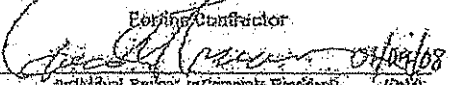
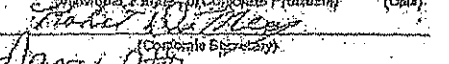
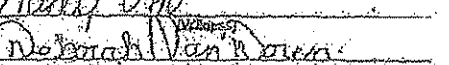
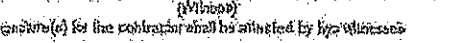
CONTRACT
FOR HIGHWAY WORK

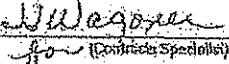
Wisconsin Department of Transportation

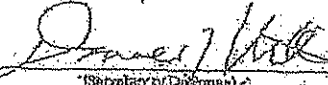
COUNTY	STATE PROJECT ID	FEDERAL PROJECT ID	PROJECT DESCRIPTION	HIGHWAY
Winnebago	6110-15-73	STP 2007639	Wisconsin Street, City of Oshkosh, Winzel Ave-Fox River Bridge	STH 44
Winnebago	6110-16-71	STP 2007640	Ohio Street, City of Oshkosh, South Park Ave.-Winzel Ave.	STH 44

Contractor Firm Name and Address Mussion Bros., Inc. 909 Boyce Drive Rothschild, WI 54501	
Approximate Sum of Contract (in Words) Four Million, Three Hundred Ninety-Three Thousand, Eight Hundred Thirty-Three Dollars, and 15/100	
Approximate Sum of Contract (in Numbers) \$4,393,833.15	Date Proposal Submitted December 11, 2007

This Contract, for improving the above-designated project, is made and entered into by the Wisconsin Department of Transportation, and the Contractor identified above. The Proposal for executing the above-designated project submitted on the date specified above, by the Contractor, is accepted by the State. The accepted Proposal, the applicable plans, specifications, and the special provisions are all made a part of this Contract. In consideration, the State agrees to pay the Contractor, the approximate sum specified above. The actual sum to be paid will be the aggregate total determined by the work actually performed by the Contractor, calculated upon the unit prices identified in the contract.

For the Contractor

Individual, Partner, or Corporate President (Only)

Contractor Representative

Witness

Witness
Signatures of the contractor shall be witnessed by two witnesses

For the Wisconsin Department of Transportation

for (Contract Specialist)
Contract and Bond Approval
By Secretary or Designee if amount is less than \$7000
Or by Governor if \$7000 or more


Secretary or Designee
(Date Contract Executed by Secretary or Designee)

JIM DOYLE
(Governor)
JAN 15 2008
(Date Contract Approved by Governor)

NOTICE TO CONTRACTOR

If the contractor is:

A) An individual doing business under a firm name, sign as individual.

B) A partnership or a joint venture, all board members must sign as partners.

C) A corporation, the execution must be by the president and secretary. Certified copy may be required of the action of the board of directors authorizing said officers to execute the contract on behalf of the corporation. Certified copy will be required if contract is not executed by the two above named officers. Affix corporate seal. If the corporation has no seal, add the symbol (L.S.).

Corporation Seal

15. 2009 10:57AM

No. 4392 P. 20

22

CONTRACT BOND PERFORMANCE AND PAYMENT

PART A: PERFORMANCE

We, the undersigned Contractor as Principal, and Surety are jointly bound to the State of Wisconsin for the performance amount specified below as Part A: Performance for the faithful performance of this contract. The condition of this obligation is such that if the Principal shall perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of this contract and its subsequent amendments, notice of such amendments to the Surety being waived, then this obligation shall be void; otherwise it is binding.

PART B: PAYMENT

We, the Principal and Surety are jointly bound to the State of Wisconsin in the additional amount specified below as Part B: Payment for all claims, costs and charges. The condition of this obligation is such that if the Principal shall promptly make payment pursuant to section 779.14 Wisconsin Statutes, to all persons who supply labor and material directly to the Principal in the prosecution of the work provided for in this contract and its subsequent amendments, notice of such amendments to the Surety being waived, then this obligation shall be void; otherwise it is binding.

The total liability for Part A Performance shall not exceed that amount specified below and shall accrue to the sole benefit of the Wisconsin Department of Transportation. The total liability for Part B Payment shall not exceed that amount specified below. The total liability of this contract bond, identified below, is the sum of the Part A Performance and the Part B Payment. We bind ourselves, our heirs, executors, and administrators for the total contract bond liability.

Attorney-in-Fact for Surety - Print Name Bernie M. Barton	Date Bond Executed January 1, 2008
Attorney-in-Fact Area Code - Telephone Number 262-792-2212	Bond Number - REQUIRED 1831769
Surety Name and Address THE HANOVER INSURANCE COMPANY 333 West Pierce Road Itasca, Illinois 60143	Part A: Performance \$4,393,833.15
	Part B: Payment \$4,393,833.15
	Total Contract Bond Liability \$8,787,666.30

Surety: Please attach ONE copy of Power of Attorney.

(Signature of Attorney-in-Fact for Surety)

Surety Seal

(Signature of Principal and Surety)

DUSON BROS., INC.

(Signature of Contractor)

THOMAS

(Signature)

ROBERTA

(Signature)

<p>On this above date, the identified Attorney-in-Fact for the identified surety, personally appeared before me, the Notary Public, and upon oath declared that:</p> <ol style="list-style-type: none"> The corporate seal affixed to this document is the seal of the identified surety; The Attorney-in-Fact, affixed his seal and executed this document as the free act and deed of the surety; The Attorney-in-Fact is not a party to the contract to be bonded; This surety bond was written through a licensed agent. 		<p>January 3, 2008 (Date)</p> <p>State of Wisconsin } County of } On this above date, this instrument was acknowledged before me by the named person(s):</p> <p>Elizabeth M. Fiedor (Signature: Notary Public, State of Wisconsin)</p> <p>Elizabeth M. Fiedor (Print Name: Notary Public, State of Wisconsin)</p> <p>July 11, 2010 (Date Commission Expires)</p>
<p>Notary Seal</p>		



Wisconsin Department of Transportation

Daily Diary Report

4/7/2008 10:35 AM

FieldManager 4.2c

Contract: 20071211022, WISCONSIN ST, OHIO ST, CITY OSHKOSH

Diary Date 4/3/2008	Day of Week Thursday	Project / Resident Engineer RYAN SCHANHOFFER	
Author Ryan Schanhofer		Federal Project Number STP 2007639, 640	
Prime Contractor MUSSON BROS., INC.			
Entered By Ryan Schanhofer		Revised By RS, Ryan Schanhofer	Revision Date 4/7/2008 10:24 AM
			Revision No. 3
Sunrise	Sunset	Temperatures Low: 29 ° F High: 45 ° F	
		Weather M CLOUDY	
Comments PROJECT DIARY: CONTRACTORS ON SITE: NEA, MUSSON, STORM TODAY MARKED THE BEGINNING OF SOME ACTUAL WORK ON THE PROJECT. NEA IS ON SITE WITH A MILL REMOVING THE ASPHALT OVERLAY THAT IS ON THE MAINLINE PAVEMENT. THEY HAVE 16 TRUCKS ON AS WELL CLOSED 6TH AVE TOTALLY TO CROSS TRAFFIC DUE TO THE LARGE NUMBER OF TRUCKS ON THE JOB AND THE RELATIVELY HIGH VOLUME OF TRAFFIC IN 6TH. SCOOTER ALSO CAME DOWN AND PUT THE LIGHTS ONTO RED FLASH ALL THE WAY AROUND. <u>MUSSON HAS A COUPLE OF MEN HERE AS WELL. THEY ARE SWEEPING AND CLEANING UP AFTER THE MILL MACHINE. I HOPE THEY ARE NOT LOOKING TO GET PAID FOR THIS, BECAUSE I DIDN'T ASK THEM TO DO THE WORK.</u> STORM FINALLY HAS MOST OF THE CORRECTIONS MADE TO THE TRAFFIC CONTROL EQUIPMENT. I GAVE A LIST TO MUSSON OF THE FEW THINGS THAT STILL REQUIRED FIXING. I WILL BEGIN PAYMENT FOR EVERYTHING THAT HAS BEEN INSTALLED AS OF TODAY. THE LAST TWO DAYS THERE WERE SO MANY ERRORS THAT I AM NOT PAYING FOR THE WORK.			

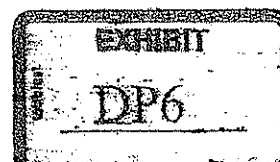
Site Information

Site Number	Site Description	Days Charged	Contractor(s) Working	Hours Available	Hours Worked	Controlling Operations	Reason for Delays	Comments
00	COMPLETION DATE	N/A	Yes	8.00	8.00	PAVEMENT REMOVAL		

Contract: 20071211022

Diary: 4/3/2008, RS

Page 1 of 2



A.App.00059



Wisconsin Department of Transportation

Daily Diary Report

4/14/2008 3:05 PM

FieldManager 4.4a

Contract: 20071211022, WISCONSIN ST, OHIO ST, CITY OSHKOSH

Diary Date 4/14/2008	Day of Week Monday	Project / Resident Engineer RYAN SCHANHOFFER		
Author Ryan Schanhofer		Federal Project Number STP 2007639, 640	Elec. Attachments None	
Prime Contractor MUSSON BROS., INC.				
Entered By Ryan Schanhofer		Revised By	Revision Date	Revision No.
Sunrise	Sunset	Temperatures Low: 28 ° F High: 48 ° F		Weather CLEAR
<p>Comments</p> <p>PROJECT DIARY: CONTRACTORS ON SITE: MUSSON</p> <p>NO ACTUAL WORK IS HAPPENING TODAY. THE WET SPRING HAS CAUSED THE LANDFILL TO DECIDE NOT TO ACCEPT FILL MATERIAL FROM MUSSON EXC UNLESS IT IS DRY. WE KNOW THIS IS NOT THE CASE TODAY, SO MUSSON IS UNABLE TO DIG SINCE THEY HAVE NOWHERE TO GO WITH THE SPOIL. WE WILL BE LOOKING AT A SITE LATER THIS MORNING WITH SHELLEY FROM DNR. THE SITE IS WEST OF TOWN OFF OF WIS 21.</p> <p>MET WITH SHELLEY ALLNESS AND DON ERICKSON AT THE "COUSSINEA" SALVAGE YARD WEST OF OSHKOSH ON WIS 21. AS SOON AS I DROVE IN THE DRIVEWAY I KNEW THIS WASN'T GOING TO WORK. THE WHOLE SITE IS LOW AND WET AND I COULD SEE AREAS THAT APPEARED TO BE WETLANDS. WE DROVE TO THE REAR OF THE PROPERTY (NORTH) AND DOWN SHOWED US THE PROPOSED AREA. IN FACT, GROUND EFFECTS HAS ALREADY INSTALLED SILT FENCE. THE AREA HAD BEEN PARTIALLY STRIPPED AND PILES OF METAL/GLASS CREATED. IN MY OPINION THIS SITE IS THE DEFINITION OF A WETLAND. THERE WERE TAGELDERS AND DOGWOOD, ALONG WITH BLACK SOILS. I COULDN'T BELIEVE THAT MUSSON THOUGHT THIS WAS REMOTELY POSSIBLE. SHELLEY IMMEDIATELY DENIED THE REQUEST AND THEN ASKED SOME QUESTIONS ABOUT HOW THIS GOT TO THIS POINT. I THINK THE PROPERTY OWNER IS GOING TO HAVE SOME EXPLAINING TO DO. DON GOT PRETTY ORNERY AND STATED THAT THEY CAN HARDLY DO BUSINESS WITH ALL OF THE PETTY REGULATIONS, ETC. IF THIS WAS A BORDERLINE CASE I WOULD UNDERSTAND FRUSTRATION, BUT THIS CLEARLY NOT AN OPTION...AT ALL. I WAS EMBARRASSED FOR HIM AND MUSSON. I WILL NOT BE PAYING FOR THE SILT FENCE INSTALLED AT THE SITE.</p> <p>WE ARE BACK TO SQUARE ONE IN REGARDS TO OUR WASTE SITES. I AM TOLD I WILL HEAR FROM MUSSON SHORTLY.</p> <p>PRETTY QUIET DAY ON SITE AGAIN TODAY.</p>				

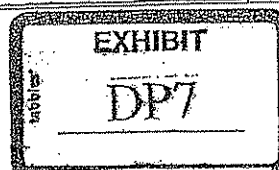
Site Information

Site Number	Site Description	Days Charged	Contractor(s) Working	Hours Available	Hours Worked	Controlling Operations	Reason for Delays	Comments
00	COMPLETION DATE	N/A	No	8 00		WATERMAIN (3RD AVE - 6TH AVE)	NOWHERE TO GO WITH EXCV. WASTE MATERIAL	

Contract: 20071211022

Diary: 4/14/2008, RS

Page 1 of 2



A.App.00060



Wisconsin Department of Transportation

Daily Diary Report

4/16/2008 3:05 PM

FieldManager 4.4a

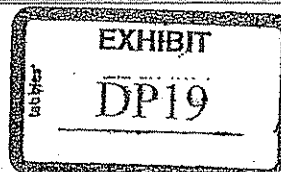
Contract: 20071211022, WISCONSIN ST, OHIO ST, CITY OSHKOSH

Diary Date 4/16/2008	Day of Week Wednesday	Project / Resident Engineer RYAN SCHANHOFFER			
Author Ryan Schanhofner		Federal Project Number STP 2007639, 640		Elec. Attachments None	
Prime Contractor MUSSON BROS., INC.					
Entered By Ryan Schanhofner		Revised By		Revision Date	Revision No.
Sunrise	Sunset	Temperatures Low: 43 ° F High: 72 ° F		Weather SUNNY	
<p>Comments</p> <p>PROJECT DIARY: CONTRACTORS ON SITE: MUSSON</p> <p>MUSSON INSTALLING WATERMAIN. OPERATIONS SEEM TO BE GOING OK. HAULED SOME MATERIAL TO BERLIN AS IT WAS CONTAMINATED, AND HAULED A FEW LOADS TO THE EAA.</p> <p>CITY INSPECTOR HAS ISSUE WITH THE BACKFILL MATERIAL MUSSON WAS USING ABOVE THE PIPE. <u>NOT WHAT THEY USUALLY USE. MIKE FROM MUSSON STOPPED AND WANTED TO KNOW IF HE HAD TO USE WHAT THEY SAID. THE MATERIAL HE WAS USING IS GRADE 2 GRANULAR. I LOOKED UP THE CITY SPECS FOR WATERMAIN, WHICH ARE REFERENCED INTO THE CONTRACT, AND DETERMINED MUSSON MUST USE WHAT WAS SPECIFIED IN THERE. 3/4" CRUSHED GRAVEL IS WHAT THE INSPECTOR WANTED. MUSSON DECIDED TO JUST USE IT AND AVOID A FIGHT.</u></p> <p>MATT, STS CONTAMINATED INSPECTOR, STOPPED IN THE FIELD OFFICE LATE IN THE DAY AND MENTIONED THAT MUSSON IS NOT COMPACTING WELL AND THAT HE HAD LET HIS BOSS KNOW. FROM WHAT I HAD OBSERVED EARLIER IN THE DAY THEY WERE PERFORMING OK, BUT I WAS NOT THERE MUCH. I ASKED MARK, CITY INSPECTOR, IF HE WAS HAPPY WITH THEIR COMPACTION. HE SAID THEY WERE DOING A GOOD JOB. I AM NOT SURE WHAT IS GOING ON WITH MATT. SINCE IT IS MARK'S JOB TO INSPECT THE WATER MAIN I AM GOING TO ASSUME HE IS CORRECT. WE WILL PAY ATTENTION TO THIS QUIETLY THE NEXT COUPLE OF DAYS.</p> <p>SPOKE WITH TOM REGARDING THE SPEC FOR THE FILL ABANDONED PIPE ITEM. THIS IS A CITY ITEM. SUPPLIERS HAVE BEEN CONTACTING HIM STATING THEY CANNOT REACH THE REQUIRED STRENGTH IN THE SPEC BASED ON THE SPEC DESIGN. TOM ASKED ME TO DISCUSS WITH CITY AS TO WHY THE PSI OF THE FINISHED CONCRETE NEEDS TO BE SO HIGH. SUPPLIERS CAN HIT ABOUT 80 PSI, WHERE THE SPEC CALLS FOR 135-150PSI. I PUT A CALL IN TO STEVE GOHDE AND LEFT A MESSAGE.</p> <p>ISSUES WITH REMOVING STORM SEWER. PLAN LISTS SOME REMOVAL ON THE PLAN, SOME IN THE MISC QUANTITIES. MANY AREAS DO NOT MATCH AND DO NOT FOLLOW THE REQUIREMENT THAT THEY ARE PAID SEPERATELY IF THE PIPE IS NOT IN A TRENCH AND REMOVAL IS ITS OWN OPERATION. TOM TOLD ME TO CLARIFY WITH STEVE GOHDE AS TO WHAT HE WANTS REMOVED AND PAY FOR IT ACCORDINGLY. CALL PLACED TO STEVE AND MESSAGE LEFT.</p> <p>DAN BEAUDION FROM LALONDE CALLED A MEETING FOR THE NORTH PROJECT. I WENT TO IT AT THE SITE, BUT I HAD TO BEARING. NOT SURE WHY I WAS THERE.</p>					

Contract: 20071211022

Diary: 4/16/2008, RS

Page: 1 of 2



A.App.00061



Daily Diary Report

Wisconsin Department of Transportation

Attn: 7/23 AM

Field: 4/23

Contract: 20071211022, WISCONSIN ST, OHIO ST, CITY OSHKOSH

Diary Date 4/23/2008	Day of Week Wednesday	Project / Resident Engineer RYAN SCHANHOFFER		
Author Ryan Schanhoffer		Federal Project Number STP 2007539, 540	Elec. Attachments None	
Prime Contractor MUSSON BROS., INC.				
Entered By Ryan Schanhoffer		Revised By RS, Ryan Schanhoffer	Revision Date 4/24/2008 3:23 PM	Revision No. 1
Sunrise	Sunset	Temperatures Low: 43 °F High: 70 °F		Weather SUNNY
<p>Comments</p> <p>PROJECT DIARY: CONTRACTORS ON SITE: MUSSON</p> <p>HELD BUSINESS MEETING THIS AM. THERE WERE ONLY 3 PEOPLE IN ATTENDANCE OTHER THAN JEREMY, ME, AND STEVE GONDE FROM CITY OF OSHKOSH. UHAUL SENT 2 PEOPLE AND THE MUSIC STORE ON 8TH HAD A PERSON THERE. UHAUL WAS CONCERNED ABOUT ACCESS AND CLEANLINESS OF THEIR LOT. MUSIC STORE WANTED A TYPE III MOVED TO ALLOW ANOTHER PARKING SPOT ON THE STREET. WERE ABLE TO HELP BOTH PARTIES OUT.</p> <p>STILL PLAN TO HAVE A MEETING IN TWO WEEKS. HOPEFULLY WE WILL HAVE BETTER ATTENDANCE.</p> <p>STEVE GONDE OK'D THE USE OF 80-90PSI CELLULAR CONCRETE MIX. I HAD EMAILED HIM INFORMING HIM OF THE ISSUE WITH GETTING THE 135-150PSI STRENGTH THE SPEC CALLS OUT. I ALSO ASKED HIM THE INTENT OF THE REMOVING STORM SEWER WORK AS THE PLAN IS NOT CLEAR IN ANY MANNER ON THIS. HE ASKED THAT ALL EXISTING STORM SEWER 16" AND LARGER IN SIZE BE REMOVED.</p> <p>CONTRACTORS MEETING WAS HELD THIS MORNING. MARK AND MIKE FROM MUSSON, PETE GULBROTON FROM OSHKOSH, MATT FROM STS, PAUL FROM WPS GAS, JEREMY AND I IN ATTENDANCE. MUSSON PRESENTED EXTRA WORK CHARGE TO THE CITY FOR OFFSET WATERMAIN. I COULD TELL THAT PETE WAS NOT TOO HAPPY WITH THE BILL. I TOLD HIM HE WAS NOT ON THE SPOT AND HE SHOULD REVIEW THIS WEEK AND WE WILL DISCUSS NEXT WEEK. THAT WILL BE THE GENERAL OUTLINE FOR EXTRA WORK. PRESENT IT AT A MEETING AND DISCUSS/DECIDE ON NEXT WEEKS MEETING. DISCUSSED HOW TO INSTALL UTILITIES WITH THE LOCATION OF THE PROPOSED. IT WAS AGREED UPON THAT THE BEST WAY TO DO THINGS IS TO KEEP EVERYTHING CAUGHT UP ON IN ONE OR TWO BLOCK SEGMENTS. THE STORM NEEDS TO BE CAUGHT UP SO THAT WATER CAN BE DIRECTED INTO THE NEW SYSTEM AND OFF THE PROJECT.</p> <p>DISCUSSED THE LOW PERMEABLE PLUG INSTALLATIONS. THE CITY WILL INSPECT THE PLUGS THAT ARE IN THEIR UTILITIES AND WE WILL INSPECT THE PLUGS FOR STORM. WE ALSO PLAN TO GRAB A SAMPLE OF EVERY FOUR IN CASE THERE IS DISAGREEMENT OVER THE MATERIAL. STORM SEWER BACKFILL REQUIREMENTS AND MATERIAL CERTIFICATIONS WERE ALSO DISCUSSED.</p> <p>TIM FROM HIGHWAY LANDSCAPERS STOPPED TO DISCUSS THE BOX CULVERT AND PARAPET WALLS. MATT FROM STS STOPPED. POUR PLUS TOMORROW AM.</p>				

Site Information

Site Number	Site Description	Days Charged	Contractor(s) Working	Hours Available	Hours Worked	Controlling Operations	Reasons for Delays	Comments
00	COMPLETION DATE	N/A	Yes	8.00	8.00	WATER MAIN		

Contract: 20071211022

Diary: 4/23/2008, RS

Page 1 of 2

A.App.00062



Wisconsin Department of Transportation

Daily Diary Report

4/25/2008 10:39 AM

Field Manager 4.42

Contract: 20071211022, WISCONSIN ST, OHIO ST, CITY OSHKOSH

Diary Date 4/25/2008	Day of Week Friday	Project / Resident Engineer RYAN SCHANHOFFER			
Author Ryan Schanhofner		Federal Project Number STP 2007639, 640		Elec. Attachments None	
Prime Contractor MUSSON BROS., INC.					
Entered By Ryan Schanhofner		Revised By		Revision Date	Revision No.
Sunrise	Sunset	Temperatures Low: ° F High: ° F		Weather CLOUDY - PM RAIN	
<p>Comments PROJECT DIARY: CONTRACTORS ON SITE: MUSSON</p> <p>MUSSON IS PUTTING PIPE IN THE GROUND TODAY. THE FORECAST IS NOT GOOD FOR LATER, BUT THEY ARE GOING TO TRY TO GET SOMETHING DONE.</p> <p>I RECEIVED AN EMAIL FROM STEVE GOHDE WITH THE TEST RESULTS FOR THE COMPACTION IN THE WATERMAIN TRENCHES. THE RESULTS WERE PASSING. HE ASKED IF I WOULD LIKE TO SEE THE RESULTS AS THEY COME IN AND I SAID THAT I WOULD APPRECIATE A COPY. WILL HELP ME KEEP ON TOP OF THE QUALITY OUT THERE.</p> <p>JEREMY PERFORMED AND EROSION INSPECTION AND DETERMINED THERE WAS SOME REQUIRED WORK TO BE PERFORMED. HE GAVE MUSSON AN ORDER TO COMPLETE THE WORK THIS MORNING BEFORE THE NEXT BATCH OF POOR WEATHER SETS IN THIS AFTERNOON.</p> <p>SPOKE WITH MARK C AND HE TOLD ME HE WOULD HAVE THE THEIR CERTIFICATIONS TO ME NEXT WEEK.</p> <p>SPOKE WITH MARK FROM WISCONSIN CONCRETE PIPE REGARDING THE BOX CULVERT DESIGN. HE GAVE ME THE DESIGNERS INFORMATION AND ASKED THAT I PASS IT ON TO THE BUREAU REVIEWER SO THEY CAN DISCUSS THE QUESTIONS IN THE DESIGN. CALLED LEE SCHUCHARDT AND PASSED THE INFORMATION ON.</p> <p>RAIN STOPPED WORK ABOUT 11AM. ANOTHER PARTIAL RAINOUT FOR THE CREW.</p> <p><u>MIKE STOPPED AND ASKED IF HE COULD REMOVE THE PAVEMENT ON THE REMAINDER OF THE PROJECT. NOTHING IN THE CONTRACT PREVENTS HIM FROM DOING THIS SO YES. I DID ADVISE THAT THEY LEAVE 9TH AND 6TH AVENUE IN FOR TRAFFIC PURPOSES.</u></p>					

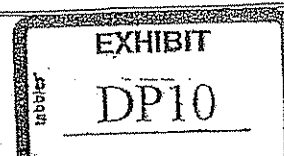
Site Information

Site Number	Site Description	Days Charged	Contractor(s) Working	Hours Available	Hours Worked	Controlling Operations	Reason for Delays	Comments
00	COMPLETION DATE	N/A	Yes	4.00	4.00	WATER MAIN	1/2 DAY RAIN OUT	

Contract: 20071211022

Diary: 4/25/2008, RS

Page 1 of 4



A.App.00063



Wisconsin Department of Transportation

Daily Diary Report

5/2/2008 4:15 PM
Fido/Donner 4 4a

Contract: 20071211022, WISCONSIN ST, OHIO ST, CITY OSHKOSH

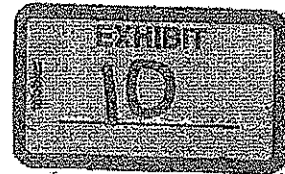
Diary Date 4/29/2008		Day of Week Tuesday		Project / Resident Engineer RYAN SCHANHOFFER	
Author Ryan Schanhofner			Federal Project Number STP 2007639, 640		Rec. Attachments None
Prime Contractor MUSSON BROS., INC.					
Entered By Ryan Schanhofner			Revised By		Revision Date
Sunrise		Sunset		Weather P CLOUDY	
		Temperatures Low: 36 ° F High: 44 ° F			
<p>Comments</p> <p>PROJECT DIARY:</p> <p>CONTRACTORS ON SITE: MUSSON, STORM, GROUND EFFECTS</p> <p>STORM INSTALLED THE MESSAGE BOARDS TO PREPARE FOR THE CLOSURE OF WITZEL AND WISCONSIN ON TUESDAY MAY 6. THEY DID NOT PUT THEM WHERE THE PLAN SPECIFIED THAT THEY DO. THEY DID NOT ASK ME IF THE NEW LOCATIONS THEY PLACED THEM AT WERE OK WITH ME. I REVIEWED THE LOCATIONS AND THEY WILL WORK. THIS IS NOT ACCEPTABLE PROCEDURE HOWEVER. I WILL DISCUSS WITH MUSSON.</p> <p>GROUND EFFECTS CAME IN AND CLEANED ALL OF THE INLET PROTECTIONS OUT. WE HAD GIVEN MUSSON AN EROSION ORDER TO THIS EFFECT.</p> <p>MUSSON IS INSTALLING WATER MAIN IN THE 5TH AVE INTERSECTION. ALSO BUSTING PAVEMENT FROM 5TH AVENUE WORKING TO THE SOUTH. PLAN TO BEGIN WIDESPREAD REMOVAL OF THE PAVEMENT NEXT WEEK.</p> <p>A VOID UNDER THE CONCRETE IN THE 5TH AVE INTERSECTION WAS DISCOVERED THIS AFTERNOON. LOOKS LIKE A SIZEABLE VOID UNDER THE PAVEMENT. WE THINK THE STORM SEWER HAS BEEN BROKEN SOMEWHERE AND TOOK IN SOME OF THE MATERIAL AND UNDERMINED THE PAVEMENT. THIS WOULD ALSO EXPLAIN WHY THE INTERSECTION TO THE NORTH DOES NOT DRAIN AND ONE OF THE MHS IS FULL OF SOIL. INSTRUCTED MUSSON TO BREAK THE CONCRETE AND FILL WITH STONE. IT IS A HAZARD AS IT IS NOW.</p> <p>MUSSON WAS PUMPING TRENCH WATER ONTO THE GRADE. I ASKED MIKE TO PUMP INTO A SOCK AS NOTED IN THE EOP. HE DID NOT WANT TO PUMP INTO ONE AS THE WATER IS CONTAINED ON SITE. I WANT IT IN A SOCK AND THEN IT SHOULD BE DIRECTED TO THE SS SYSTEM. AS IT IS THEY ARE PUMPING WATER IN CIRCLES.</p> <p>KE HAD A SURVEY MAN ON SITE TODAY, JOSH WILBER. I SENT LUKE WITH HIM AND THEY SHOT IN VARIOUS STRUCTURES ON EITHER SIDE OF THE BRIDGE SO WPS CAN BORE POWER ACROSS THE ROADWAY WITHOUT PUTTING IT RIGHT WHERE FUTURE WORK IS PROPOSED.</p> <p>HANDED OUT LETTERS TO BUSINESS OWNERS LETTING THEM KNOW OF THE LOOMING CLOSURE OF WITZEL AND THE BRIDGE.</p> <p>SPOKE WITH ERIK HENDRICKSON OF URS THIS AFTERNOON. HE ASKED IF I HAD THE LANE CLOSURE INFORMATION IN THE SYSTEM FOR NEXT WEEKS WORK. HE DID NOT HAVE THE TRAINING AND HADNT ENTERED ANYTHING. I LET HIM KNOW THAT I ENTERED THE CLOSURES AND HE IS COVERED BY MY ENTRIES.</p> <p>I ASKED MIKE AND TONY BOTH TO MAKE SURE THE DRIVEWAYS ARE TOUCHED UP NEAR SOUTHPARK.</p> <p>I ALSO ASKED THEM TO CREATE BETTER ACCESS OFF 4TH TO THE EAST AND FROM THE GRADE TO THE CONCRETE BETWEEN 4TH WEST AND 4TH EAST. THEY NEED TO CLEAN THINGS UP SOME. ACCESS IS</p>					

Contract: 20071211022

Diary: 4/29/2008, RS

Page 1 of 3

A.App.00064



Daily Diary Report

Wisconsin Department of Transportation

5/7/2008 1:55 PM

Field Manager 4-4a

Contract: 20071211022, WISCONSIN ST, OHIO ST, CITY OSHKOSH

Diary Date 5/7/2008	Day of Week Wednesday	Project / Resident Engineer RYAN SCHANHOFFER	
Author Ryan Schanhoffer		Federal Project Number STP 2007639, 640	Elect. Attachments None
Prime Contractor MUSSON BROS., INC.			
Entered By Ryan Schanhoffer		Revised By RS, Ryan Schanhoffer	Revision Date 5/8/2008 3:42 PM
			Revision No. 1
Sunrise	Sunset	Temperatures Low: 57 °F High: 84 °F	Weather M CLOUDY
<p>Comments</p> <p>PROJECT DIARY: CONTRACTORS ON SITE: MUSSON, STORM</p> <p>MUSSON CONTINUES TO WORK ON SANITARY. STORM IS HERE CLEANING UP AND THINNING OUT SOME OF THE TRAFFIC CONTROL EQUIP PER MY REQUEST. IN AREAS WHERE THE PAVEMENT IS REMOVED THE TRAFFIC IS NOT ABLE TO TRAVEL AT HIGH SPEEDS ANYMORE, SO NO NEED FOR TRAFFIC CONTROL DEVICES TO ACT AS SPEED DETERENTS.</p> <p>BUSINESS MEETING THIS MORNING AT DAM. 3 PEOPLE SHOWED AGAIN TO VOICE THEIR OPINIONS. THE GUYS FROM UHAUL WERE THERE, AS WAS A GENTLEMAN FROM RUTHANNE'S ON THE NE CORNER OF OHIO AND 4TH. THE UHAUL REPS WERE JUST INTERESTED IN THE SCHEDULE AND GENERAL INFO. THE PERSON FROM RUTHANNE'S WAS UPSET WITH HOW VEHICLES WERE DRIVING DOWN THE SIDEWALK AND HOW THEY WOULD NOT FOLLOW SIGNS. HE ALSO DID NOT LIKE THE WHERE MANY OF THE WORKERS PARKED THEIR VEHICLES ON THE SIDE STREETS. I TOLD HIM I WOULD DISCUSS PARKING WITH THE CONTRACTOR, AND I SPOKE WITH MIKE ABOUT IT. HE SAID HE WILL TRY TO KEEP HIS MEN FROM PARKING IN ANYONES WAY.</p> <p>SPOKE WITH MARK C AND MIKE R ON THE GRADE PRIOR TO THE MEETING. MARK ASKED IF I THOUGHT THERE WAS A CHANCE HE COULD GET AN EXTRA FOR DRIVING THE SHEETING. I TOLD HIM HE NEEDS TO PUT SOMETHING TOGETHER FORMALLY IF HE FEELS HE SHOULD BE COMPENSATED FOR THE WORK. HE WAS FEELING ME OUT, BUT I THEN TOLD HIM THIS WILL BE ABOVE ME FOR A DECISION SO THE NEED TO FORMALIZE ON PAPER IS NECESSARY TO MOVE FORWARD AT ALL. NOT SURE WHAT HE WILL DO NEXT. MIKE ALSO TOLD ME HE IS HEARING FROM SOME OF THE BUSINESS OWNERS THAT PEOPLE IN THE CITY ARE TALKING ABOUT MUSSON AS POOR CONTRACTORS WHO HAVE NO IDEA WHAT THEY ARE DOING. HE WAS VISIBLY UPSET ABOUT IT. HE WANTED TO HASH IT OUT WITH THE CITY. I ADVISED HIM TO KEEP HIS EMOTIONS IN CHECK AND REMEMBER THERE IS A LOT OF WORK REMAINING. HE CALMED DOWN BEFORE THE MEETING.</p> <p>WEEKLY CONTRACTORS MEETING HELD. DISCUSSION REGARDING THE EXTRAS FOR WATCHMAN. PETE SAYS THEY WILL PAY FOR THEM. HE IS JUST NOT CERTAIN HOW MUCH THEY ARE WILLING TO PAY. WE NEED TO HAVE A DECISION ON THIS.</p> <p>SPOKE ABOUT PRODUCTION CONCERNS ON MY END. MARK EXPLAINED THAT THEY PLAN TO BRING IN ANOTHER CREW ON MONDAY AND POSSIBLY A THIRD CREW IN ANOTHER WEEK OR TWO. WE DISCUSSED SUBS WHO NEED TO GET IN AND PERFORM THEIR WORK IN THE NEXT WEEK.</p> <p>CHRIS FROM STORM STOPPED IN AND SAID HE IS SICK OF MIKE YELLING AT HIS EMPLOYEES. I ASKED HIM TO TAKE IT UP WITH MARK FROM MUSSON SOMETIME OTHER THAN OUR MEETING.</p> <p>PLAN ERROR WITH THE SANITARY SEWER WILL RESULT IN EXTRA WORK TOMORROW FOR MUSSON. PLAN LABELS A PIPE AS AN BINCH AND IT IS ACTUALLY 30 INCH. THE NEW SANITARY IS DESIGNED TO GO THROUGH IT. IT MUST STAY ACTIVE SO THEY WILL DIG OUT AND CUT A V IN THE EXISTING AND LAY THE NEW PIPE ON IT.</p>			

Contract: 20071211022

Diary: 5/7/2008, RS

Page 1 of 3

A.App.00065



Michigan Department of Transportation

Daily Diary Report

5/12/2008 4:04 PM

Project Engineer: A.A.

IDRs Dated 5/12/2008

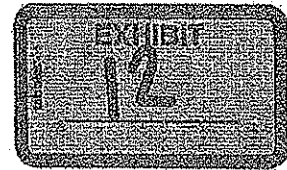
Inspector's Name	IDR Seq. No.	Comments
RS Ryan Schanhöfer	1	<p>INSPECTOR'S REPORTS: SANITARY & WATER DIARY: *Second crew began work on site today, hereinafter one will be called Michigan and other will be Rhineland, based on the crew origin. *Michigan crew began laying sanitary sewer from San 121+04.25 at Sta 92+00 and is heading north towards Witzel Ave. Contractor is removing the existing 24" storm sewer as they encounter it. Most spoil material is a mix of garbage, black organic loam and clay, and old railroad ties. Material is being hauled to EAA dump site. *Rhineland crew began laying sanitary sewer from approx. Sta 89+00 and is heading south on Ohio St towards 3rd Ave.</p>

Contractor Information

Contractor's Name	Personnel	No.	Equipment	No.
KUZBASO CONSTRUCTION MUSSON BROS., INC.	REMOVAL CREW	2	BOOM TRUCK	1
	SANITARY CREW	12	BACKHOE	2
			DOZER	1
			ROE PACK	2
			LOADER	2
			TRUCKS	4

Signature: _____

Ryan Schanhöfer



Wisconsin Department of Transportation

Daily Diary Report

5/13/2008 4:04 PM

Field Manager: A/A

Contract: 20071211022, WISCONSIN ST, OHIO ST, CITY OSHKOSH

Diary Date 5/13/2008	Day of Week Tuesday	Project / Resident Engineer RYAN SCHANHOFFER	
Author Ryan Schanhöfer		Federal Project Number STP 2007639, 640	Elect. Attachments None
Prime Contractor MUSSON BROS., INC.			
Entered By Ryan Schanhöfer		Revised By RS, Ryan Schanhöfer	Revision Date 5/14/2008 4:50 PM
			Revision No. 2
Sunrise	Sunset	Temperatures Low: 41 °F High: 71 °F	
		Weather M CLOUDY	
<p>Comments</p> <p>PROJECT DIARY:</p> <p>CONTRACTORS ON SITE: MUSSON, BEACON ELECTRIC</p> <p>MUSSON CONTINUES TO WORK ON THE SANITARY SEWER. TODAY I NOTICED THAT THEY ARE PUMPING THE WATER INTO THE SANITARY SEWER TO DEWATER THE TRENCHES. THEY ABANDONED THE STORM SEWER THAT DUTFALLS INTO THE RIVER TO KEEP THE WATER FROM WORKING BACK INTO THE WORK ZONE. THEY DUG UP THE PIPE ON THE DOWNSTREAM SIDE OF THE LAST MH AND FILLED WITH CLEAR STONE AS A FILTER. THEY THEN BULKHEADED THE LINE IN THE MH.</p> <p>I ASKED MIKE ABOUT THE PUMPING OF THE WATER INTO THE SANITARY. HE TOLD ME HE IS GETTING PERMITS RIGHT FROM THE CITY TO DO IT AND THEIR INSPECTOR IS WATCHING THEM THE ENTIRE TIME. I LOOKED AT THE WATER COMING OUT OF THE PUMP HOSE AND IT LOOKED CLEAR. MIKE SAID HE HAS ALL OF THE PUMPS BURIED IN CLEAR STONE TO KEEP THE SEDIMENT OUT</p> <p>I REVIEWED THE ECIP AND MUSSON'S NEW APPROACH TO MANAGING THE WATER IS DIFFERENT THAT THEY HAD ORIGINALLY STATED. I CONTACTED MARK C AND REQUIRED HIM TO SUBMIT AN AMENDMENT TO THE ECIP DESCRIBING THE PUMPING METHODS, THE ABANDONED STORM, ETC TO GET THINGS CURRENT. I AM NOT WORRIED ABOUT ANY SEDIMENT GOING ANYWHERE BUT INTO THE SANITARY, AND THAT IS THE CITY PERSONNEL'S CALL. HOWEVER, THE ECIP MUST BE KEPT CURRENT. MARK ASSURED ME HE WOULD HAVE THEIR EROSION PERSON (DON ERICKSON) MAKE THE NECESSARY AMENDMENTS AND GET IT TO ME.</p> <p>BEACON ELECTRIC IS HERE PULLING DOWN ALL OF THE STREET LIGHTS. ONE OF THE WORKERS STOPPED IN AND ASKED IF THEY COULD REMOVE THE STOP LIGHTS AT 9TH AVENUE. I TOLD HIM THAT UNLESS THEY HAD A VERY GOOD REASON THAT I WAS NOT AWARE OF... NO. THERE IS TOO MUCH TRAFFIC THERE AND NO NEED TO PULL THEM AT THIS TIME. HE SAID THEY WILL LEAVE THEM UNTIL LATER IN THE PROJECT.</p>			

Site Information

Site Number	Site Description	Days Charged	Contractor(s) Working	Hours Available	Hours Worked	Controlling Operations	Reason for Delays	Comments
00	COMPLETION DATE	N/A	Yes	8.00	8.00	SANITARY SEWER		

Contract: 20071211022

Diary: 5/13/2008, RS

Page 1 of 2

A.App.00067

CITY OF OSHKOSH
ENGINEERING DIVISION

DAILY INSPECTION REPORT



Customer: _____
Project Name: Ohio St.
Project No.: _____ Contract: 08-07
Contractor: Musson
Design Project No.: _____
Construction Engineer: _____

Report No.: 9
Date: 5-16-08
Weather: AM P.M.
Temperature (°F) High: _____ Low: _____
Frost Depth: _____
Line & Grade Method: _____
Contractor Super: Tony

Number and function of Contractor's Personnel Hours Worked. (Identify Subcontractors Separately)

Contractor	Function	No.	Hrs.	Contractor	Function	No.	Hrs.

Sketch	Major Const. Equip. Descrip.	Size/Capacity	No.	Hrs.

PIPELAYING Sanitary ☒ Storm ☐ Water ☒ Rehab ☐

Location (MH to MH)	Station From	To	Linear Feet	Size	Type of Pipe	Bedding Type	Backfill Type	MH/CD Depth	Soil Conditions

Station	Excavation Inference Encountered Elev. Above Ft of Pipe	Size & Description	Location MH to MH	Wye/Tapping Station	Size	Riser Height

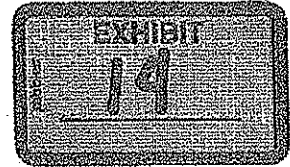
Daily Notations: Put in 56' of 12" sanitary on sanitary MH #38.
Made a temporary hook up to existing 8" sanitary storming cast into MH.

Musson was told by Mark Miller and myself that the storm main should be hooked back up. Musson chose to plug said manhole off. Musson talked with State about this. This was done when they put the water main in. Also were supposed to do a block at a time, but chose to go all the way to 6th.

Visitor: _____

Representing _____

Inspector: Randy Peterson Page 9 of _____



Wisconsin Department of Transportation

Daily Diary Report

6/5/2008 12:30 PM

Field Engineer RLS

Contract: 20071211022, WISCONSIN ST, OHIO ST, CITY OSHKOSH

Diary Date 6/5/2008	Day of Week Thursday	Project / Resident Engineer RYAN SCHARHOFER	
Author Ryan Scharhofer		Federal Project Number STP 2007638, 640	Elec. Attachments None
Prime Contractor MUSSON BROS., INC.			
Entered By Ryan Scharhofer		Revised By	Revision Date Revision No.
Sunrise	Sunset	Temperatures Low: 62 °F High: 77 °F	
		Weather RAIN-AM, CLOUDY-PM	
<p>Comments PROJECT DIARY: CONTRACTORS ON SITE: MUSSON</p> <p>HEAVY RAIN THIS MORNING. THE GRADE IS COMPLETELY SATURATED AND THE WATER HAS NOWHERE TO GO. MUSSON IS NOT ABLE TO WORK ON PIPE AT ALL TODAY, WHICH IS THE CONTROLLING ITEM. MOST OF THE WORKERS WERE SENT HOME. REMOVING PAVEMENT FROM 10-11TH AVE.</p> <p>ASKED TOM IF ANY THOUGHT WAS GIVEN TO THE STORM LATERALS DURING THE DESIGN PHASE. SOME OF THE MAINS THAT THEY TIE INTO WILL CONTINUALLY BE FULL OF WATER. THIS MAY CAUSE SOME ISSUES. TOM ADVISED I TALK TO PETE G TO SEE WHAT HIS THOUGHTS ON THE ISSUE ARE. I LEFT A MESSAGE FOR PETE TO GET IN TOUCH WITH ME TO DISCUSS.</p> <p>WITZEL STORM SEWER BACKED UP SOME ONTO THE ROADWAY. CITY HAD MEN OUT TRYING TO DETERMINE THE PROBLEM. THE ISSUE IS MUSSON ABANDONED THE LINE SO THE WATER GOES NOWHERE. ONLY OPTION IS TO PUMP IT. MUSSON AND CITY WORKFORCE WORKING TOGETHER ON THE ISSUE.</p> <p>TRAVEL WAY ON THE PROJECT IS MUDDY, BUT THERE IS REALLY NOTHING THAT CAN BE DONE UNTIL IT DRIES UP.</p>			

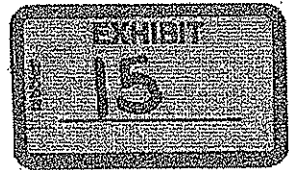
Site Information		Days Charged	Contractor(s) Working	Hours Available	Hours Worked	Controlling Operations	Reason for Delays	Comments
Site Number	Site Description							
00	COMPLETION DATE	NA	Yes		8.00	CITY UTILITIES	RAIN	FULL DAY PRODUCTION LOST TO WEATHER

Contract: 20071211022

Diary: 6/5/2008, RS

Page 1 of 2

A.App.00069



Wisconsin Department of Transportation

Daily Diary Report

6/7/2008 3:45 PM

Field Supervisor: L.A.

Contract: 20071211022, WISCONSIN ST, OHIO ST, CITY OSHKOSH

Diary Date 6/8/2008	Day of Week Sunday	Project / Resident Engineer RYAN SCHANHOFFER			
Author Ryan Schanhofner		Federal Project Number SIP 2007539, 640		Elec. Attachments None	
Prime Contractor MUSSON BROS., INC.					
Entered By Ryan Schanhofner		Revised By		Revision Date	Revision No.
Sunrise	Sunset	Temperatures Low: °F High: °F		Weather	
Comments WEEKEND, NO WORK CONTRACTORS CHOICE. HEAVY RAINS HIT THE PROJECT TODAY. ESTIMATED 4.25 INCHES FELL IN ADDITION TO THE RAIN YESTERDAY. SIGNIFICANT FLOODING WAS REPORTED. MIKE R WAS CLAIMED TO BE ON SITE EARLY AFTERNOON TURNING ON ALL THE PUMPS TO TRY TO HANDLE THE WATER. ACCORDING TO MIKE THE PUMPS COULD NOT KEEP UP.					

Site Information

Site Number	Site Description	Days Charged	Contractor(s) Working	Hours Available	Hours Worked	Controlling Operations	Reason for Delays	Comments
00	COMPLETION DATE	N/A	No					

Signature:

Ryan Schanhofner



Wisconsin Department of Transportation

Daily Diary Report



6/17/2008 2:45 PM

Field Engineer 4.44

Contract: 20071211022, WISCONSIN ST, OHIO ST, CITY OSHKOSH

Diary Date 6/10/2008		Day of Week Tuesday		Project / Resident Engineer RYAN SCHARHOFER	
Author Ryan Scharhoffer			Federal Project Number STP 2007030, 640		Disc. Attachments None
Prime Contractor MUSSON BROS., INC.					
Entered By Ryan Scharhoffer			Revised By RS, Ryan Scharhoffer		Revision Date 6/17/2008 2:44 PM
					Revision No. 3
Sunrise	Sunset	Temperatures Low: °F High: °F		Weather P SUNNY	
<p>Comments</p> <p>PROJECT DIARY</p> <p>CONTRACTORS ON SITE: MUSSON, GROUND EFFECTS, STORM</p> <p>SEVERAL CONVERSATIONS WERE HELD TODAY REGARDING THE RAIN EVENT THAT OCCURED ON SUNDAY. I WAS NOT ON SITE YESTERDAY SO I WALKED THE ENTIRE SITE THIS MORNING WITH JEREMY TO TRY TO UNDERSTAND THE WATER LEVELS ASSOCIATED WITH THE FLOODING. IT SEEMS THAT THE DEEPEST FLOODING OCCURED IN THE AREA OF 10TH THROUGH 12TH BASED ON SOME OF THE INDICATORS FOR WATER HEIGHT. I WAS ALSO AWARE FROM THE NEWS THAT SOME RESIDENTS ON EIGHTH STREET HAD FLOODED BASEMENTS.</p> <p>I SPOKE WITH MIKE RAMUTA FIRST THING IN THE MORNING AND HE INFORMED ME THAT THE CITY HAS THEIR 6INCH PUMP SET UP AT 7TH STREET TO DRAW DOWN THE WATER. MUSSON IS ON SITE AND THEY WILL INSTALL IT IN PLACE OF THE CITY'S AS SOON AS THE CITY REMOVES THEIRS. HE ALSO SAID THAT THE CITY IS BLAMING ALL OF THE FLOODING ON MUSSON'S OPERATIONS. SPECIFICALLY THE FACT THAT THEY PULLED THE EXISTING STORM OUT TO INSTALL THE NEW SANITARY SEWER UP TO 6TH. THIS LINE DRAINS EVERYTHING FROM 9TH TO BASICALLY 4TH. MIKE STATED THAT THEY HAD NO OTHER WAY TO BUILD IT AND THAT THERE WOULD HAVE BEEN FLOODING EITHER WAY SINCE THE LINE IS SURCHARGED.</p> <p>NEXT CONVERSATION WAS WITH PETE FROM THE CITY. HE ASKED WHAT KIND OF PULL I HAD WITH MUSSON AND IF I THOUGHT I COULD GET THEM TO PUMP OUT THE LINE THAT DRAINS WITZEL. THIS IS MUSSON'S RESPONSIBILITY SO IT WILL GET DONE. MIKE ALREADY HAD WELLS IN AND WAS WORKING ON GETTING PUMPS. 4TH AND 6TH AVENUE WILL ALSO NEED TO BE PUMPED IN A RAIN EVENT ACCORDING TO PETE. I SPOKE WITH MIKE ABOUT MAKING SURE THERE WERE ADEQUATE PUMPING DEVICES TO DRAIN THE SYSTEM IF NEEDED.</p> <p>SPOKE WITH TONY REGARDING THE STATE OF THE TEMP ROAD. HE HAD HIS LOADER OPERATOR WORKING ON TOUCHING THINGS UP FOR TRAFFIC. THEY BURNED UP A LOT OF TEMP GRAVEL REBUILDING THINGS.</p> <p>SPOKE WITH PETE AGAIN AND HE TOLD ME THAT HE FEELS MUSSON IS RESPONSIBLE FOR ALL OF THE FLOODING ON THE PROJECT. I MENTIONED THAT THE AREA FROM 8TH TO THE SOUTH ALSO FLOODED BADLY, AND THE STORM SEWER IS IN WORKING ORDER IN THAT SECTION. HE STILL THOUGHT MUSSON MADE THE SITUATION WORSE. I THINK IT IS HARD TO SAY WHETHER IT DID OR NOT.</p> <p>SPOKE WITH TOM 8 REGARDING ALL OF THE ISSUES GOING ON AND THE CONVERSATIONS I WAS HAVING. HE MENTIONED HE HAD A CALL FROM A REPORTER QUESTIONING SCHEDULE AND FROM AN ANGRY HOMEOWNER WHO WAS OK ONCE HE TALKED WITH HER. I TOLD HIM OF THE CITY'S VIEWS TOWARD THE FLOODING AND WITH THEIR BELIEF IT IS MUSSON'S FAULT. HE THOUGHT IT WAS GOING TO FLOOD ANYWAY AND THE BIG ISSUE IS THIS TYPE OF FLOODING WILL ALWAYS BE AN ISSUE ON OHIO DUE TO THE STORM SEWER BEING SURCHARGED TO THE DEGREE IT IS. HE TOLD ME TO TRY TO STAY OUT OF IT AS MUCH AS POSSIBLE.</p>					

Contract: 20071211022

Diary: 6/10/2008, RS

Page 1 of 3

A.App.00071



Wisconsin Department of Transportation

Daily Diary Report

6/17/2008 2:45 PM

FieldManager 4.6a

PETE CALLED ME AND TOLD ME HE HIRED 4-WAY TO INSTALL THE ADDED WATERMAIN TIE-INS ON SOUTH CAMPBELL AND ACROSS WITZEL AT 7:00. HE ASKED IF I COULD STAKE OUT SOME STORM SEWER. SPOKE WITH MARK MULLER FROM THE WATER DEPARTMENT AND ASKED HIM WHAT STORM SEWER HE NEEDED STAKED. I HAD JOSH AND JEREMY STAKE THINGS OUT.

PETE MENTIONED THAT MUSSON WOULD NOT BE ALLOWED TO PUMP INTO THE SANITARY ANYMORE UNLESS IT WAS CONTAMINATED. HE CLAIMED THEY TOLD HIM IT WAS IN THE ECIP AND THEY COULD DO IT. I TOLD PETE THAT ITS NOT PART OF THE ECIP TO PUMP CLEAN WATER INTO THE SANITARY AND IT IS UP TO THE CITY TO POLICE THEIR SEWER. THEY WERE PUMPING INTO IT RIGHT IN FRONT OF THE CITY INSPECTORS FOR THE ENTIRE PROJECT SO FAR. IF THE INSPECTORS HAD NO ISSUE WITH IT WHY SHOULD I SINCE IT IS THEIR FACILITY

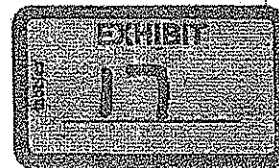
PETE CALLED ME LATER IN THE DAY AND ASKED ME IF I HAD THE AUTHORITY TO SHUT MUSSON DOWN IF THE CITY HAD ASKED ME TO. I WASN'T REAL SURE WHAT HE MEANT. HE THEN SAID HE WANTED TO KNOW WHAT AUTHORITY I HAD TO SHUT MUSSON DOWN SINCE THEY HAD SOME STORM ABANDONED. HE THEN ASKED ME WHEN I KNEW THE STORM SEWER WAS ABANDONED. I TOLD HIM THAT THE PIPE PILED ALONG THE GRADE WERE THE GIVEAWAY THAT THEY WERE ABANDONING THE SYSTEM. HE TOLD ME THAT DAVE PATEK FEELS I AM ALSO RESPONSIBLE FOR THE FLOODING. I TOLD PETE THAT I WAS NOT SURE I COULD SHUT THEM DOWN IF THE CITY ASKED ME TO. I WOULD HAVE TO REVIEW THAT. I ALSO TOLD HIM THAT THE MEANS, METHODS, AND TECHNIQUES THE CONTRACTOR USES TO CONSTRUCT THE PROJECT ARE HIS RESPONSIBILITY AND I AM NOT IN THE BUSINESS OF DIRECTING THEM ON HOW TO DO THEIR JOB. AT THE SAME TIME PETE WAS IN THE SAME MEETINGS AS I WAS WHEN IT WAS EXPRESSED TO MARK C AND MIKE R OF MUSSON THAT WE WERE CONCERNED HOW THEY WERE GOING TO CONSTRUCT THIS PROJECT AND HANDLE THE STORM WATER. WE EXPRESSED CONCERNS AND THEY SAID THEY WERE CONFIDENT THEY COULD BUILD IT IN STAGES AND HANDLE THE WATER. I ALSO TOLD PETE THAT THIS WAS A RARE STORM AND IT IS DIFFICULT TO EXPECT MUSSON TO PLAN FOR AN EVENT OF THIS MAGNITUDE. HE SAID THAT DAVE PATEK HAS A COUNCIL MEETING THIS EVENING AND THAT HE EXPECTED HIM TO LAY SOME OF THE BLAME ON THE DEPARTMENT FOR THE EVENTS. I FEEL THIS IS A PASS OF THE BUCK, BUT I DIDN'T SAY MUCH TO PETE REGARDING THIS. HIS INSPECTORS AND PETE HAVE BEEN ON THE JOB EVERYDAY FOR 2 MONTHS WATCHING THEM BUILD THE UTILITIES AND PULL OUT THE STORM SEWER. IF THEY WERE SO WORRIED ABOUT THIS WHY WASN'T IT EVER MENTIONED PRIOR TO THE INCHES OF RAIN. I TRIED CALLING TOM B TO LET HIM KNOW ABOUT THIS LATEST DEVELOPMENT, BUT WAS NOT ABLE TO GET IN TOUCH WITH HIM. NOT MUCH I CAN DO ABOUT THE SITUATION.

MIKE R STOPPED IN THE FIELD OFFICE LATE IN THE DAY AND ASKED ME TO CALL BOB DEMESY FROM THE RHINELANDER OFFICE. HE IS THE VP AND WANTS TO TALK TO ME ABOUT WHERE IT SHOWS THEY HAVE TO PUMP WATER. I SHOWED MIKE IN THE SPEC BOOK WHERE IT COVER DRAINAGE DURING CONSTRUCTION. HE CALLED BOB BACK AND THEN BOB SAID HE WOULD BE ON SITE LATER IN THE DAY TO DISCUSS THINGS WITH ME. HE ALSO SAID HE WAS TOLD NOT TO RUN THE PUMPS UNTIL SOMEONE TELLS THEM HOW THEY ARE GETTING COMPENSATED. I TOLD MIKE HE MUST RUN THE PUMPS IF IT RAINS A DROP. HE AGREED TO THAT AT LEAST. I WILL TALK WITH BOB D TOMORROW.

WEEKLY MEETING IS TOMORROW. IT SHOULD BE WELL ATTENDED FOR A CHANGE. I EXPECT A FEW PEOPLE FROM THE CITY TO ATTEND AND VOICE THEIR OPINIONS.

Site Information

Site Number	Site Description	Days Charged	Contractor(s) Working	Hours Available	Hours Worked	Controlling Operations	Reason for Delays	Comments
00	COMPLETION DATE	N/A	Yes	8.00	8.00	CITY UTILITIES		



Wisconsin Department of Transportation

Daily Diary Report

6/16/2008 2:35 PM

FieldManager 4.0a

Contract: 20071211022, WISCONSIN ST, OHIO ST, CITY OSHKOSH

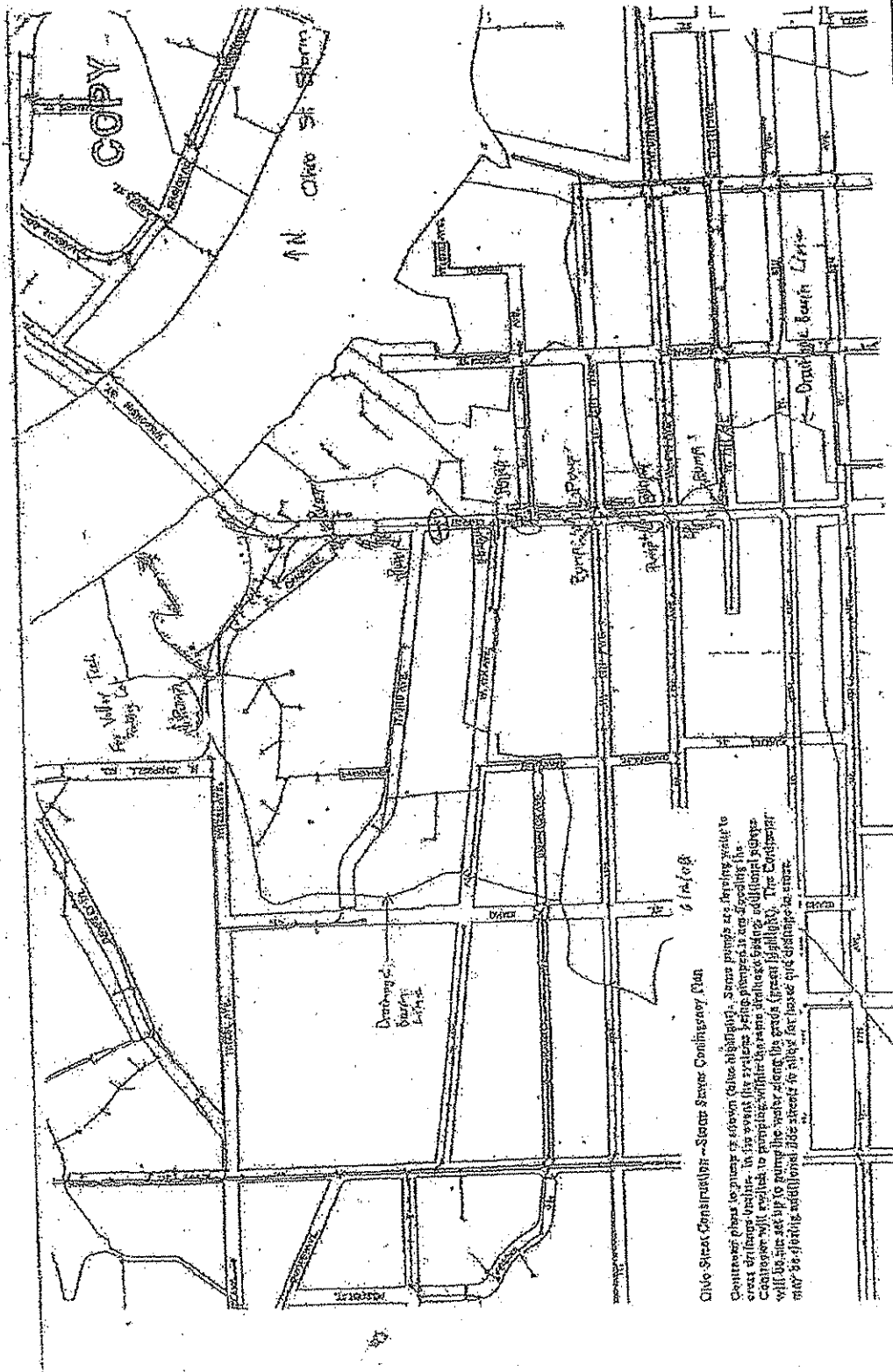
Diary Date 6/11/2008	Day of Week Wednesday	Project / Resident Engineer RYAN SCHARHOFER	
Author Ryan Scharhofer		Federal Project Number STP 2007639, 640	Elec. Attachments None
Prime Contractor MUSSON BROS., INC.			
Entered By Ryan Scharhofer		Revised By	Revision Date Revision No.
Sunrise	Sunset	Temperatures Low: 55 °F High: 68 °F	
		Weather M CLOUDY	
Comments PROJECT DIARY: CONTRACTORS ON SITE: MUSSON WEEKLY MEETING HELD THIS MORNING. IN ATTENDANCE WERE TOM B, JILL MICHAELSON, PETE G, STEVE G, MIKE R, JEREMY AND MYSELF. NO ONE OTHER THAN MIKE WAS HERE FROM MUSSON. DISCUSSED PROJECT ISSUES TO BEGIN THE MEETING. PETE NEEDS TO GET ME A SHOP DRAWING OF THE TYPE OF BLOWOUT THE CITY WANTS FOR THE SERVICE TO THE GUARDHOUSE ON THE BRIDGE. WE WILL NOT INSTALL WITHOUT IT SINCE MUSSON DOES NOT KNOW WHAT TO BUILD. DISCUSSED THE MISSED STORM LATERAL TO THE SCHOOL DISTRICT AS WELL AS THE MS DRAIN TO NOWHERE ON CAMPBELL. WILL HOOK EVERYTHING BACK UP AT THE LEAST COST POSSIBLE. THE REMAINDER OF THE MEETIN FOCUSED ON THE FLOODING OF THE PROJECT SITE THAT HAPPENED ON SUNDAY AND THE POSSIBILITY OF MORE HEAVY RAINS TOMORROW. ASKED MIKE TO DESCRIBE IN DETAIL WHAT THEY PLAN TO DO TO GET THE WATER DEDICATED TO THE AREAS WITH NO OPERATIONAL STORM SEWER TO THEIR OUTFALL. THE BASIC PLAN IS AS FOLLOWS: 6INCH PUMP AND 7TH AVE WITH PUMP DOWN TO THE BOX THAT TRAVEL UNDER MICHIGAN. STEVE G NOTED THAT THE WATER COLLECTED AT 7TH AVE INTERSECTION WITH OHIO IS A DIFFERENT DRAINAGE BASIN THAN WHERE IT WILL BE PUMPED TO ON MICHIGAN. IF THAT BASIN BEGINS TO FLOOD THEN MUSSON IS TO STOP PUMPING THE WATER THERE. MIKE R THAN STATED HE WILL PUMP IT TO THE GRADE NORTH OF 6TH WHICH ALL RUNS TOWARD FAMILY VIDEO AND AN OUTFALL IN THE CORRECT BASIN. A PUMP WILL BE READY FOR USE AT 6TH (LIKELY A 2INCH WITH ANOTHER ON HAND) AND WILL PUMP THIS WATER TO THE GRADE WILL DRAIN TOWARD FAMILY VIDEO. A STONE PIT IN THE NORTH CORNER OF 6TH WILL DRAIN THE STORM AND THE SHEET FLOW WEST. A 4INCH PUMP WILL BE IN THIS PIT AND DIRECT PUMPED TO THE MH AT FAMILY VIDEO WHICH DRAINS TO THE OUTFALL. 4TH AVE WEST WILL BE HANDLE THE SAME WAY. A PUMP BURIED IN STONE WILL BE PLACE AT THE 4TH EAST INTERSECTION TO TRANSFER THE WATER HERE FROM THE GRADE INTO THE MH AT FAMILY VIDEO THAT DRAINS TO THE OUTFALL. ALL OF THE WATER FROM 3RD WILL DRAIN TO WITZEL AND WILL MOSTLY RETAIN. THERE IS A WELL IN THAT WILL PUMP SOME WATER UP TO THE MH WHICH DRAINS UNDER THE BRIDGE, BUT NOT A LARGE VOLUME DUE TO HEADLOSS. A 6INCH PUMP WILL BE SET AT WITZEL LIMITS TO DRAIN THAT SYSTEM AND WILL PUMP IT OUT TO THE SYSTEM AT FOX VALLEY TECH PARKING LOT. THIS IS ALSO A DIFFERENT BASIN, SO IF THERE IS FLOODING HERE THEY WILL DRAIN THIS SYSTEM ONTO THE CITY EASEMENT IN THE GRASS FIELD AND LET IT SHEET DRAIN. MOST OF IT COMES BACK TO WITZEL. HARD TO DETERMINE IF THERE IS ENOUGH STORAGE, BUT THE INITIAL THOUGHT IS THIS AREA CAN HOLD A REAL LOT OF WATER. WILL DEPEND ON HOW SEVERE THE RAINS ARE, WHICH IN THAT CASE MAY NOT MATTER ANYWAY. MIKE AGREED TO WORK ON GETTING ALL OF THESE MEASURES IN PLACE BY THIS EVENING. I OK'D CLOSING ANY SIDE STREETS THAT WILL HINDER THESE STEPS. MUSSON IS FREE TO CLOSE AS THEY NEED. I ALSO WAIVED THE NOISE RESTRICTIONS IF HE NEEDS TO PUMP AT NIGHT ANYTIME THIS WEEK. STEVE FROM CITY ALSO BROUGHT UP THE FACT THAT THE CITY IS INVESTIGATING THAT 6TH STREET FLOODING AT THE IT MAY BE MUSSON'S FAULT. ACCORDING TO HIM THE WATER CAME IN THROUGH THE FLOOR DRAIN AND WHEN THE STORM WAS PUMPED IT WENT DOWN IN THE BASEMENT. HOUSE MAY HAVE BEEN CROSS CONNECTED. MIKE ASKED HOW THEY WERE AT FAULT SINCE ALL OF THE STORM SEWER			

Contract 20071211022

Diary: 6/11/2008, RS

Page 1 of 2

A.App.00073





Wisconsin Department of Transportation

Daily Diary Report

5/18/2008 3:55 PM

FieldManager 4.4a

Contract: 20071211022, WISCONSIN ST, OHIO ST, CITY OSHKOSH

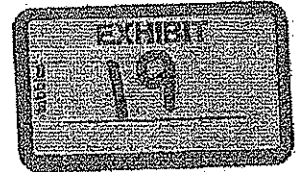
Diary Date 6/12/2008	Day of Week Thursday	Project / Resident Engineer RYAN SCHANHOFFER		
Author Ryan Schanhofer		Federal Project Number STP 2007639, 640	Elec. Attachments None	
Prime Contractor MUSSON BROS., INC.				
Entered By Ryan Schanhofer		Revised By	Revision Date	Revision No.
Sunrise	Sunset	Temperatures Low: 62 ° F High: 72 ° F		Weather HEAVY RAINS
<p>Comments</p> <p>PROJECT DIARY: CONTRACTORS ON SITE: MUSSON</p> <p>DUE TO THE EVENTS YESTERDAY I WAS NOT ABLE TO ENTER THE DIARY INFORMATION UNTIL FRIDAY MORNING. IT WAS A CRAZY DAY IN MANY ASPECTS.</p> <p>THE FORECASTED REPORT FOR THE DAY WAS HEAVY RAINS THIS AFTERNOON. MUSSON BEGAN PUTTING THEIR PUMPS INTO PLACE PER THE DISCUSSIONS AT YESTERDAY'S MEETING ABOUT 9-10AM. THE PUMPS ARE SET AT 7TH, 6TH, 5TH, 4TH, 3RD, WITZEL, AS WELL AS IN THE WITZEL INTERSECTION.</p> <p><u>MIKE AND PETE GOT INTO ANOTHER DISAGREEMENT REGARDING EXTRA WORK. I ASKED EACH OF THEM FROM NOW ON TO MAKE SURE I AM IN THE DISCUSSION WHEN EXTRA WORK OCCURS. I KEEP GETTING TOTALLY DIFFERENT STORIES FROM EACH OF THEM REGARDING WHAT IS HAPPENING WITH SITUATIONS. I DON'T KNOW WHO IS ALTERING THEIR TUNE, BUT IF WE ALL SIT DOWN TOGETHER THE PROBLEM WILL BE ELIMINATED.</u></p> <p>STEVE G FROM THE CITY OF OSHKOSH CALLED AND ASKED IF MUSSON HAD ALL OF THEIR PUMPS IN PLACE AS DESCRIBED IN THE MEETING. WE WENT OVER THEM AGAIN. STEVE THEN ASKED THAT I HAVE MUSSON SEAL THE NEW SANITARY MANHOLES NEAR IMPROVED AND 3RD AVE AND INTO WITZEL SO NO WATER GOT INTO THE SANITARY. I CALLED TOM B ABOUT THIS AS MUSSON FEELS THIS IS AN EXTRA. TOM TOLD ME TO LET THE CITY KNOW THAT THE WORK WILL BE PAID AS AN EXTRA AND IF I WANT HE WILL CALL. I TOLD HIM I WOULD TAKE CARE OF IT. I WENT WITH ONE OF TONY'S MEN AND SHOWED HIM THE MHS THAT THE CITY REQUESTED. TONY WAS NOT WORRIED ABOUT THE EXTRA TIME TO DO THIS. I THINK HE WAS TRYING TO KEEP PEACE. IT TOOK ABOUT 10 MINUTES TOTAL. ALSO HAD THEM BAG ALL OF THE SANITARY MANHOLES ON THE PROJECT THAT WERE ALLOWING INFILTRATION TO STOP THAT PER STEVE'S REQUEST.</p> <p>RAIN STARTED AROUND 11AM. HARD BUT LET OFF. ON AND OFF FOR A WHILE BUT THE PUMPING WAS WORKING. GOT A CALL FROM PETE AND ALSO HAD A MESSAGE FROM STEVE G THAT THE SS ON EIGHTH TO THE WEST WAS BACKING UP. I WAS AT LUNCH BUT IMMEDIATELY GOT IN TOUCH WITH MIKE R AND WENT TO LOOK AT THE MAINLINE MH IN THE INTERSECTION OF EIGHTH AND OHIO TO SEE IF IT WAS NOT DRAINING. THE LINE COMING FROM EIGHTH TO THE WEST WAS DRAINING FINE, SO THE INLETS IN THE SAG OFF THE PROJECT LIMITS WERE NOT. I CALLED PETE FROM THE CITY TO LET HIM KNOW THEY WERE PLUGGED. THERE IS ALSO AN INTERMEDIATE INLET BETWEEN THE SAG AND OHIO STREET THAT WAS DRAINING OK.</p> <p>EXTREMELY HEAVY RAIN BEGAN MID AFTERNOON AND CONTINUED INTO THE EARLY EVENING. I HAD LUKE OBSERVING THE 7TH AVE PUMPING AND JEREMY AND I MOVED FROM LOCATION TO LOCATION TO OBSERVE. THE RAIN IS COMING DOWN IN SHEETS. BY 5:00 WE ARE LOSING SIGNIFICANT GROUND ON THE WATER. THE PUMP AT WITZEL IS NOT WORKING, BUT TONY IS OUT GETTING IT GOING. THE SYSTEM IN THE FVTC LOT IS TAKING THE WATER WITHOUT PROBLEM. RECEIVED A CALL FROM STEVE G ABOUT 5:30. HE TOLD ME THE CITY OFFICIALS ARE IN THE BASEMENT AND THERE ARE TORNADOES AND SEVER WEATHER ON THE HORIZON. I CALLED ALL OF MY MEN OFF AND TOLD THEM TO GET INSIDE. MADE MIKE R AWARE OF THE</p>				

Contract: 20071211022

Diary: 6/12/2008, RS

Page 1 of 3

A.App.00075



Wisconsin Department of Transportation

Daily Diary Report

5/16/2008 3:56 PM

Page 1 of 4

Contract: 20071211022, WISCONSIN ST, OHIO ST, CITY OSHKOSH

Diary Date 6/16/2008	Day of Week Monday	Project / Resident Engineer RYAN SCHANHOFFER		
Author Ryan Schanhoffer		Federal Project Number STP 2007539.640	Elec. Attachments None	
Prime Contractor MUSSON BRDS., INC.				
Entered By Ryan Schanhoffer		Revised By RS, Ryan Schanhoffer	Revision Date 6/17/2008 3:44 PM	Revision No. 1
Sunrise	Sunset	Temperatures Low: * F High: * F		Weather
<p>Comments</p> <p>PROJECT DIARY: CONTRACTORS ON SITE: MUSSON</p> <p>MARK C FROM MUSSON STOPPED BY TODAY TO DISCUSS THE SITUATION ON THE PROJECT. HE IS ALSO GATHERING INFORMATION RELATING TO PUMPING, ETC ON THE PROJECT. HE EXPECTS TO SUBMIT A CCO FOR PUMPING WATER ON THE PROJECT.</p> <p>SPOKE WITH STEVE G. HE ASKED IF WE HAD FINISHED THE MAP OF THE REPAIRED SANITARY MHS YET. I TOLD HIM IT HAS BEEN DONE SINCE THURSDAY. HE AGAIN SAID THEY WILL SEND SOMEONE TO GET IT.</p> <p>I ALSO NOTED TO STEVE G THAT THERE ARE PERSISTENT RUMORS THAT THE CITY IS TELLING THE PUBLIC THAT MUSSON IS RESPONSIBLE FOR THE FLOODING. NOT SURE THEY SHOULD BE SPECULATING. HE SAID THAT TO HIS KNOWLEDGE NO ONE IS CLAIMING THAT FROM THE CITY.</p> <p>THE WATER IS BASICALLY ALL OFF THE GRADE TODAY. THE OWNER OF LESSONWORKS CALLED AND ASKED IF WE COULD PUT SOME GRAVEL IN THE LOW SPOT IN FRONT OF HIS PLACE. IT REALLY ISN'T TOO BAD BUT IT WILL MAKE HIM MUCH HAPPIER SO I HAD MUSSON SCRATCH A LITTLE IN THERE.</p> <p>MIKE R TOLD ME THAT MARK IS BEING A WHOLE LOT EASIER TO WORK WITH TODAY. HE THINKS HIS BOSS HAD A DISCUSSION WITH HIM. I AM GETTING FAIRLY SICK OF THE CITY INSPECTORS AND MUSSON'S MEN. NOT BEING ABLE TO GET ALONG AND WORK TOGETHER. BOTH SIDES OF THE RELATIONSHIP ARE MAKING IT DIFFICULT AT THIS POINT. I FEEL LIKE A BIG BABYSITTER.</p>				

Site Information

Site Number	Site Description	Paye Charged	Contractors Working	Hours Available	Hours Worked	Controlling Operations	Reason for Delay	Comments
00	COMPLETION DATE	N/A	Yes	8.00	8.00	CITY UTILITIES		

Contract: 20071211022

Diary: 6/16/2008, RS

Page 1 of 4

A.App.00076



Wisconsin Department of Transportation

Daily Diary Report

7/18/2008 10:25 AM

Field Manager: J. Am

Contract: 20071211022, WISCONSIN ST, OHIO ST, CITY OSHKOSH

Diary Date 7/18/2008	Day of Week Friday	Project / Resident Engineer RYAN SCHANHOFFER		
Author Ryan Schanhofner		Federal Project Number STP 2007639, 640	Elec. Attachments None	
Prime Contractor MUSSON BROS., INC.				
Entered By Ryan Schanhofner		Revised By RS, Ryan Schanhofner	Revision Date 7/28/2008 1:24 PM	Revision No. 1
Sunrise	Sunset	Temperatures Low: 70 ° F High: 84 ° F		Weather M CLOUDY
<p>Comments</p> <p>PROJECT DIARY:</p> <p>CONTRACTORS ON SITE: MUSSON</p> <p>HAD SEVERAL DISCUSSIONS WITH MIKE AND TONY TODAY ABOUT HOW TO HANDLE THE PUMPS IN THE EVENT OF A HEAVY RAIN. NO CREWS ARE WORKING TOMORROW, SO THEY HIRED CHARLIE FROM GROUND EFFECTS TO COME IN AND TURN ON THE PUMPS IN THE EVENT THERE IS RAIN. THE FORECAST DOES NOT LOOK GOOD AND THE CITY IS AGAIN QUITE CONCERNED. I RECEIVED A CALL FROM STEVE GOMDE LATE IN THE DAY QUESTIONING THE PLAN. I COMMUNICATED TO HIM WHAT I WAS TOLD. I ALSO PUT A CALL IN TO CHARLIE TO MAKE SURE SHE WAS PLANNING ON TURNING THE PUMPS ON IF IT RAINS AND NOT IF SHE IS CALLED BECAUSE OF FLOODING PROBLEMS. I LEFT HER A MESSAGE.</p> <p>TENSIONS BETWEEN MIKE AND PETE ARE GETTING PRETTY HIGH. I AM DONE MEDIATING BETWEEN THE TWO. THEY ARE GOING TO HAVE TO FIGURE OUT A WAY TO WORK TOGETHER ON THIS PROJECT UNTIL IT IS THROUGH.</p> <p>EVERYONE ON SITE NEEDS A WEEKEND OFF. THE MUSSON CREWS ARE ON EACH OTHERS NERVES AND A COUPLE OF NEAR ALTERCATIONS CAME TO PASS THIS WEEK. HOPEFULLY A FULL WEEKEND WILL HELP THEM OUT.</p> <p>ZENITH PLANS TO BLAST 2 MORE PIERS ON MONDAY. ACCORDING TO THE ENGINEER IT WILL NOT BE A SIGNIFICANT BLAST.</p>				

Site Information

Site Number	Site Description	Days Charged	Contractor(s) Working	Hours Available	Hours Worked	Controlling Operations	Reason for Delays	Comments
00	COMPLETION DATE	N/A	Yes	8.00	8.00	STORM-SEWER		

Contract: 20071211022

Diary: 7/18/2008, RS

Page 1 of 2

A.App.00077



Wisconsin Department of Transportation

Daily Diary Report

08/12/2008 1:25 PM

Field Manager: d.aa

Contract: 20071211022, WISCONSIN ST, OHIO ST, CITY OSHKOSH

Diary Date 8/6/2008	Day of Week Wednesday	Project / Resident Engineer RYAN SCHANHOFFER	
Author Ryan Schanholzer		Federal Project Number STP 2007639, 54D	Elec. Attachments None
Prime Contractor MUSSON BROS., INC.			
Entered By Ryan Schanholzer		Revised By	Revision Date Revision No.
Sunrise	Sunset	Weather SUNNY	
Temperatures Low: 62 ° F High: 80 ° F			
<p>Comments</p> <p>PROJECT DIARY:</p> <p>CONTRACTORS ON SITE: MUSSON</p> <p>HELD THE WEEKLY MEETING THIS MORNING. NOTHING TOO NEW DISCUSSED. WENT OVER THE FINAL PLANS FOR 5TH. TEMP ASPHALT IS SCHEDULED FOR FRIDAY AFTERNOON. AGREED TO A PRICE TODAY ON IT.</p> <p>GRADING IS PROGRESSING. I SPOKE WITH THE FOREMAN AND ASKED WHEN A WATER TRUCK IS GOING TO SHOW UP. THEY HAVE THE OK TO START PLACING MATERIAL TODAY AND HAVE STARTED, BUT NO WATER. HE IS NOT WORKING, ROLLING, WATERING YET. HE SAID HE WILL LET ME KNOW.</p> <p>CITY REQUESTED DI SANITARY PIPE UNDER THE BOX CULVERT AND A 20" STEEL CASING AROUND THE WATERMAIN. THESE ARE EACH 600.</p> <p>TOM B INFORMED ME THE CITY WILL NOT ALLOW DWYS CLOSE TO INTERSECTION. STEVE G CALLED AND NOTED THE BASLER DRIVEWAYS ARE NOT AS ON PLAMP PROFILE, BUT AS ON CONCRETE PLAN.</p> <p>HANDLES VAULT IS TORN DOWN AGAIN. HE IS GOING TO REBUILD THIS WEEK ACCORDING TO PETE FROM THE CITY.</p> <p>PETE AND MIKE R ARE SERIOUSLY FEUDING THIS WEEK. THEY ARE ALMOST LIKE 5TH GRADERS. I HAVE ALMOST HAD ENOUGH OF THIS.</p>			

Site Information

Site Number	Site Description	Days Charged	Contractor(s) Working	Hours Available	Hours Worked	Controlling Operations	Reason for Delay	Comments
00	COMPLETION DATE	N/A	Yes	8.00	8.00	STORM SEWER		

Contract: 20071211022

Diary: 8/6/2008, RS

Page 1 of 3

A.App.00078



Wisconsin Department of Transportation

Daily Diary Report

02/28/2008 1:27 PM

Field Manager 4.4e

Contract 20071211022, WISCONSIN ST, OHIO ST, CITY OSHKOSH

Diary Date 8/14/2008	Day of Week Thursday	Project / Resident Engineer RYAN SCHANHOFFER			
Author Ryan Schanhoffer		Federal Project Number STP 2007639, 640		Elec. Attachments None	
Prime Contractor MUSSON BROS., INC.					
Entered By Ryan Schanhoffer		Revised By RS, Ryan Schanhoffer		Revision Date 8/15/2008 2:59 PM	Revision No. 1
Sunrise	Sunset	Temperatures Low: 55 ° F High: 75 ° F		Weather SUNNY	
<p>Comments:</p> <p>PROJECT DIARY:</p> <p>CONTRACTORS ON SITE: MUSSON, BEACON, HIGHWAY LANDSCAPERS</p> <p>MUSSON CONTINUES TO WORK ON MUCH THE SAME. I AM GETTING A FEW CALLS HERE AND THERE REGARDING THE GRADING OPERATIONS. MAINLY FROM PROPERTY OWNERS WHO WANT TO GET IN THEIR DRIVEWAYS AT THE TIME WHEN THE GRADING CREW HAS THEM RIPPED OUT AND NO GRAVEL IN YET. LES FROM MUSSON HAS BEEN OK ABOUT GETTING THEM BACK IN WHEN I ASK FOR IT.</p> <p>MIKE'S CREW INSTALLED THE OUTFALL TO THE RIVER TODAY. IT ACTUALLY WENT REALLY WELL. THEY WERE ABLE TO TOTALLY DEWATER THE TRENCH AND SET THE PIPE. THE WHOLE OPERATION WAS COMPLETED RELATIVELY QUICKLY. THE STORM WATER SYSTEM IS NOW INSTALLED AND REQUIRES NO PUMPING.</p> <p>HIGHWAY SET UP THE 6 INCH PUMP AND DIVERTED THE WATER AROUND THE BOX LOCATION AND GOT TO WORK TODAY. WERE ABLE TO REMOVE THE OLD BOX AND ALLOW MUSSON TO INSTALL THEIR PIPE THROUGH THE SITE. THE CITY INSPECTED THAT WORK.</p> <p>REALIZED THAT THERE IS NO DETAIL OR INFORMATION ON HOW TO CONSTRUCT THE TRANSITIONAL PIECE FROM PRECAST TO EXISTING. CALLED TOM B AND HE NOTED THIS WILL BE DESIGNED BY URS. I SENT THE SHOP DRAWINGS AS WELL AS AN AS-BUILT OF THE EXISTING TO URS THIS AFTERNOON. THEY HOPE TO HAVE SOMETHING TO US BY TOMORROW.</p> <p>PETE WAS UP AT THE BRIDGE COMPARING COLOR SAMPLES TO THE COLORS ON THE BRIDGE. HE ASKED ME WHAT I THOUGHT. TOLD HIM THEY ALL LOOK ALMOST THE SAME TO ME. HARD TO COMPARE A PIECE OF PAPER TO CONCRETE, EVEN PAINTED.</p>					

Site Information

Site Number	Site Description	Days Charged	Contractor(s) Working	Hours Available	Hours Worked	Controlling Operations	Reason for Delays	Comments
00	COMPLETION DATE	N/A	Yes	8.00	8.00	STORM SEWER		

Contract 20071211022

Diary: 8/14/2008, RS

Page 1 of 3

A.App.00079

Ryan B. Schanhofer

STATE OF WISCONSIN
IN THE CIRCUIT COURT FOR WINNEBAGO COUNTYSHOWERS APPRAISALS, LLC;
REAL MARKETING, LLC and
MARK W. SHOWERS,

Plaintiffs,

Case No. 05-CV-1430

vs.

CITY OF OSHKOSH;
GREEN CROSS, INC.;
WEST BEND MUTUAL INSURANCE COMPANY;
and LEAGUE OF WISCONSIN MUNICIPALITIES
Mutual Insurance.

Defendants.

DEPOSITION OF RYAN B. SCHANHOFFER

Deposition of RYAN B. SCHANHOFFER, taken
before me, at Oshkosh, Winnebago County, Wisconsin, on the
15th day of January, 2011, A.D., otherwise than
as a witness in the trial in a certain action
now pending in Circuit Court, Winnebago County,
Wisconsin, wherein the parties thereto are as set
forth above.

APPEARANCES

BERNARD, WILLIAMSON, KELLY & HERTZ,
LLP, by Daniel J. Posanski, Esq., first appeared
on behalf of the Plaintiffs.SILTON, SEIFERT & CARLSON, S.C., by
Application, Wisconsin, by RICHARD J. CARLSON,
of that firm appeared on behalf of the
Defendants City of Oshkosh and League of
Wisconsin Municipalities Mutual Insurance.McCARNA, DUDAS & KEHLEY, S.C., by
Application, Wisconsin, by DAVID G. DUDAS, of
that firm appeared on behalf of the
Defendant Mutual Insurance.

PRESENT: Mark Showers

INDEX TO EXAMINATION

PAGE

Examination by Posanski.

INDEX TO EXHIBITS

PAGE MARKED

EXHIBIT	DESCRIPTION	PAGE MARKED
1	Copy of Mark Showers	12
2	Copy of Mark Showers	12
3	Copy of Mark Showers	12
4	Copy of Mark Showers	12
5	Copy of Mark Showers	12
6	Copy of Mark Showers	12
7	Copy of Mark Showers	12
8	Copy of Mark Showers	12
9	Copy of Mark Showers	12
10	Copy of Mark Showers	12
11	Copy of Mark Showers	12
12	Copy of Mark Showers	12
13	Copy of Mark Showers	12
14	Copy of Mark Showers	12
15	Copy of Mark Showers	12
16	Copy of Mark Showers	12
17	Copy of Mark Showers	12
18	Copy of Mark Showers	12
19	Copy of Mark Showers	12
20	Copy of Mark Showers	12
21	Copy of Mark Showers	12
22	Copy of Mark Showers	12
23	Copy of Mark Showers	12
24	Copy of Mark Showers	12
25	Copy of Mark Showers	12

Said RYAN B. SCHANHOFFER, having been
first sworn under by me to testify the truth,
the whole truth, and nothing but the truth
relative to said cause, in answer to said
interrogatories, depose and make answer as
follows:

(The examination began at 2:50 p.m.
on January 12, 2011.)

EXAMINATION

BY MR. POSANSKI:

Q Hello.

A Hi.

Q Please state your name and spell your last
name for the record.

A Ryan Brian, R. L. I. R. Schanhofer.

Q S. C. A. R. I. N. E. R.

Q What is your current home address, please?

A 1234 1st Street, Oshkosh, WI 54901.

Q Oshkosh, Wisconsin.

Q Have you ever had a deposition taken of
yourself?

A I have not.

Q The general rule is just answer with

affirmative responses, no need to say, no

objection. If you don't understand the

question, just ask me to rephrase it.

A Okay.

Q If you need a break, we can do so. That's

generally it. What are you interested in here?

A I'm looking under oath about what you

have personal knowledge of. Do you know

what personal knowledge means?

A Yes.

Q What does that mean to you?

A I have knowledge of the question you're

asking.

Q No need to know what you know, not what

you're speculating about. Okay?

A Okay.

Q Are you currently employed?

A Yes.

Q By whom?

A R. L. Engineering.

Q Where is that out of?

A Out of the Green Bay office.

Q I'm producing there a Scholer corporate

office somewhere else?

A Racine.

920-733-1835

HENES &

Serving Northeast Wisconsin

800-434-3915

Page 1 to 4 of 130

A.App.00080

Ryan Schanhofer

1 meeting, in which place they bring more
2 facts to the table regarding maybe their
3 cost rate, you know, some paperwork,
4 whatever they think. And typically at that
5 stage, if I still don't agree with the
6 change, then they'll go forward with the
7 written process.
8 Q And to your knowledge, you don't recall any
9 situations on the Ohio Street reconstruction
10 project where it got to the two-day or
11 five-day written notice from Musson
12 Brothers?
13 A I don't recall any. They provided written
14 -- a written piece of paper requesting on
15 what they had for cost or what the cost was
16 going to be for a certain item. At that
17 point we were typically in agreement there
18 was a change. And the last thing to
19 negotiate was the actual dollar amount. But
20 I don't recall any. There could have been
21 some, but I've done so many different change
22 orders since that project, it's hard for me
23 to recall.
24 Q Did Musson Brothers ever discuss with you
25 their concerns about flooding on the

17

1 Ohio Street reconstruction project before
2 the storms of June 12th of 2008?
3 A I don't recall flooding being discussed. It
4 may have been, but I don't remember it.
5 Q Did they ever discuss with you, prior to the
6 June 12th, 2008 flood, as to whether or not
7 they had concerns that the Fox River was
8 below the storm sewers?
9 A I don't recall if Musson discussed that with
10 us or not, or with me personally. I don't
11 remember any specific conversation.
12 MR. CARLSON: You mean above.
13 MR. POSANSKI: Oh, I'm sorry. Above.
14 yes. Thank you, Rich.
15 Q And with his statement that they were
16 expressing concern --
17 A I understood what you were asking.
18 Q With his comment, still you don't recall
19 anything?
20 A No, I don't. It's two and a half years ago.
21 I mean, it's hard to recall conversations.
22 Q Do you recall ever telling Musson Brothers
23 that there would be no deviation from the
24 plans and specifications regarding the storm
25 sewer outfall?

18

1 A I don't recall any conversation. We had a
2 lot of discussion about the storm sewer
3 outfall.
4 Q But they never raised any concerns that the
5 DOT has to change the plans and
6 specifications regarding the storm sewer
7 outfall?
8 A They may have. I don't recall, no.
9 Q Were you concerned about the storm sewer
10 outfall at all?
11 A Define concerned. In what terms?
12 Q Concerned that the water would not drain out
13 the outfall in the event there was a rain?
14 A Yes.
15 Q And when did you make that concern? At what
16 point in time?
17 A I think I was concerned from when we started
18 in terms of how -- how it was going to get
19 constructed, the area, the fact that it is a
20 submerged system. So at least the
21 contractibility issues.
22 Q Did you discuss with Musson Brothers the
23 concern you had about drainage during the
24 construction project as to whether or not
25 there was sufficient pumps on the site

19

1 because of the outfall concerns?
2 A I don't remember a specific conversation,
3 but I know we talked about pumps a lot. So
4 to some degree, yes.
5 Q And if I remember from your prior testimony
6 when we were here last week, it's your
7 statement that the amount of pumps and the
8 strength of those pumps was up to the means
9 and methods of construction of Musson
10 Brothers, correct?
11 MR. DUDAS: Object to form. Go
12 ahead. You can answer.
13 THE WITNESS: Can we go off the
14 record for one second? It has nothing to do
15 with that question. It has to do with what
16 he said. I just want to know what object to
17 form means.
18 (Discussion off the record.)
19 THE WITNESS: Could you reask that?
20 MR. POSANSKI: Could you read it
21 back, please?
22 (Requested portion was read back.)
23 THE WITNESS: Yes, that's ultimately
24 up to them.
25 BY MR. POSANSKI:

20

920-733-1835

HENES & ASSOCIATES

1-800-434-3915

Serving Northeast Wisconsin

A.App.00081

<p>1 its ways into the inlet, and that is the 2 only way to get it to do so. Do you see 3 that statement?</p> <p>4 A I do.</p> <p>5 Q First off, do you recall writing that?</p> <p>6 A I don't.</p> <p>7 Q Do you think that's inaccurate or --</p> <p>8 A I can't say. I was guessing then.</p> <p>9 Q You're saying it wasn't by accident, but I 10 guess the theory is that somebody was 11 concerned at that point about water getting 12 into the inlet, you think?</p> <p>13 MR. DUDAS: Object to form, asked and 14 answered. Go ahead.</p> <p>15 Q (Continued) When you wrote this, were you 16 talking about concerns you had about water 17 getting into the storm water inlet?</p> <p>18 MR. DUDAS: Object to form. He just 19 said he couldn't say, he was guessing then.</p> <p>20 Q (Continued) You were guessing whether it 21 was an accident? That's what you were 22 guessing about?</p> <p>23 A Correct.</p> <p>24 Q The fact that the inlet was broken off, do 25 you have personal knowledge if that</p> <p style="text-align: center;">21</p>	<p>1 Correct.</p> <p>2 Q That was done on this project?</p> <p>3 A Correct.</p> <p>4 Q When the silt was put on top of the inlets, 5 was that removed from time to time to shake 6 off the silt or dirt that was on there?</p> <p>7 A Yes.</p> <p>8 Q How often was that done?</p> <p>9 A I couldn't say. I don't recall.</p> <p>10 Q Was that up to the contractor to shake those 11 off and get the dirt off of there?</p> <p>12 A Yes.</p> <p>13 Q After the asphalt was removed from the 14 street, was there another layer that took it 15 down a few more inches after that?</p> <p>16 A Yes.</p> <p>17 Q What layer would that be?</p> <p>18 A Concrete.</p> <p>19 Q After the concrete and asphalt are removed, 20 how many inches are we down below original 21 grade usually?</p> <p>22 A 8 to 10 inches.</p> <p>23 Q After the concrete and asphalt are removed 24 and it's 10 inches below grade, can water 25 easily get into the box culverts and the</p> <p style="text-align: center;">23</p>
<p>1 happened?</p> <p>2 A I don't recall.</p> <p>3 Q Okay. But I guess the question to you then 4 is, do you think what you wrote here is 5 wrong?</p> <p>6 A No.</p> <p>7 Q Did you see, during the project on Ohio 8 Street, any storm sewer inlets being broken 9 off?</p> <p>10 A Yes.</p> <p>11 Q And do you know why they were broken off?</p> <p>12 A No.</p> <p>13 Q What are the potential ramifications of the 14 inlets being broken off?</p> <p>15 A Erosion typically, erosion into the system.</p> <p>16 Q Typically erosion is --</p> <p>17 A Sediment.</p> <p>18 Q I'm sorry?</p> <p>19 A Sediment.</p> <p>20 Q <u>And getting sediment into the storm sewer is</u> 21 <u>something that's frowned upon?</u></p> <p>22 A Correct.</p> <p>23 Q <u>In order to prevent that from happening,</u> 24 <u>silt textiles is put over the top of inlets,</u> 25 <u>correct?</u></p> <p style="text-align: center;">22</p>	<p>1 manhole covers?</p> <p>2 A Define easily.</p> <p>3 Q Well, what event would it take for the water 4 to get into the box culverts and the storm 5 sewer?</p> <p>6 A If they're tightly sealed, 10 inches worth 7 of retention or whatever the load is from 8 that. If they're not tightly sealed, 9 there's infiltration. It depends on the 10 situation.</p> <p>11 Q When you say tightly sealed -- it was broken 12 off on the side?</p> <p>13 A Yes.</p> <p>14 Q If it was tightly sealed, no breakage, it 15 would take at least 10 inches of 16 infiltration or water to get into the box 17 culverts or the manhole covers, correct?</p> <p>18 A Correct.</p> <p>19 Q And to your recollection was approximately 20 to 10 inches of asphalt and concrete taken 21 off of Ohio Street?</p> <p>22 A I'll look.</p> <p>23 Q Thank you.</p> <p>24 A I can't look at this, not a full set, so.</p> <p>25 Q What are you missing out of that set of</p> <p style="text-align: center;">24</p>

Ryan B. Schanhofer

1 you're getting that kind of feedback?
 2 MR. DUDAS: Object to the form.
 3 Q (Continued) Is that what's going on around
 4 June 10 of 2008?
 5 A I don't recall pressure. There was a lot of
 6 conversation between various people. I
 7 don't recall pressure. I think -- I work
 8 closely with Pete and the City, and if he
 9 called and asked if there was maybe a
 10 particular reason -- I don't know if they
 11 want it pumped first. I don't remember him
 12 pressuring me into anything.
 13 Q If you go to the next page, sir, on that
 14 same Daily Diary of June 10, 2008 -- it's
 15 the June 10 IDR, right?
 16 A The 10th? I think mine must be going
 17 backwards. Yeah, I've got it here.
 18 Q One of the paragraphs says, "P G asked Tom
 19 if I could have" --
 20 A Are we on the IDR, the 10th IDR?
 21 Q No.
 22 A You jumped to which page, 10th Diary?
 23 Q Yes.
 24 A Or the 11th Diary?
 25 Q If we look through the 10th Diary, the

105

1 pages, I guess, are backed up. On Page 2 of
 2 the Diary, do you see that?
 3 A Uh-huh.
 4 Q It says, "Pete called me later in the day
 5 and asked me if I had the authority to shut
 6 Hussion down if the City had asked me to."
 7 Do you see that?
 8 A I've got to be on the wrong page. You're on
 9 the 10th?
 10 Q Yes.
 11 A Okay.
 12 Q So Pete Gulbranson from the City of Oshkosh
 13 is contacting you on June 10, 2008, and
 14 asking you potentially to see if you could
 15 shut down Hussion; correct?
 16 A Yes.
 17 Q And ultimately the DOT did not shut down
 18 Hussion; correct?
 19 A Correct.
 20 Q And the reason you didn't shut them down is
 21 because you felt as though what they were
 22 doing was according to their means and
 23 methods of penetration; correct?
 24 A Correct.
 25 Q And then go down a little ways in that

106

1 paragraph, you state that, "We expressed
 2 concerns and they said they were confident
 3 they could build it in stages and handle the
 4 water." Do you remember Hussion Bros
 5 telling you that, that they felt they could
 6 build it in stages and handle the water?
 7 A I don't remember them saying it. I see it's
 8 written in the Diary.
 9 Q Do you agree this Ohio Street reconstruction
 10 project was fairly unique?
 11 A Yes.
 12 Q Why was it fairly unique?
 13 A The existing sanitary and the existing storm
 14 water systems were in certain locations and,
 15 when the new designed systems came in, those
 16 locations flip-flopped. And that meant
 17 that; in order to install new sanitary, you
 18 had to dig through existing storm sewer.
 19 There's no other way to do it. Typically,
 20 when they're going in the same location, you
 21 just relay them along. So it was unique in
 22 that regard.
 23 Q And do you feel as though, due to the fact
 24 this project was slightly unique, that the
 25 road needed a little extra TLC, a little --

107

1 MR. DUDAS: Object to form.
 2 Q -- extra care as to making sure that the
 3 existing storm sewer system is preserved,
 4 maintained, and protected?
 5 MR. DUDAS: Objection. Objection to
 6 the question, mischaracterizes the record in
 7 this case. Go ahead.
 8 A I apologize, I got lost.
 9 Q I know you're listening to the objections.
 10 MR. PODANSKI: Read the question.
 11 (Requested portion read by reporter.)
 12 A I'm just trying to process -- can you
 13 clarify what you mean by TLC?
 14 Q I apologize, that's a poor use of the word.
 15 It means tender loving care, but for
 16 purposes of a storm sewer system, maybe
 17 that's a little extreme. Do you feel as
 18 though the fact that this project was
 19 slightly unique, that Hussion Bros. had to
 20 take some added steps or extra care in
 21 preserving, maintaining, and protecting the
 22 storm sewer system?
 23 MR. DUDAS: Object to the form of the
 24 question.
 25 A No.

108

Ryan B. Schanhofer

1	Is that your Daily Diary note of June 13, 2008?	1	where the two 2-inch pumps were located?
2	2008?	2	A Right.
3	A Yes, it is.	3	Q What your note talks about, after what you
4	Q Actually use this one We'll use this one instead. It has less writing on it.	4	spoke to Mike Ramuta about, there were no
5		5	pumps there after the storm on June 13,
6	A Okay.	6	2008, to help his property out?
7	Q On June 13 of 2008 -- that's the day after the second major storm in the City of Oshkosh; correct?	7	MR. DUDAS: Object to the form of the
8		8	question. Restates the record.
9		9	Q (Continued) Do you have knowledge whether
10	A Yes.	10	they were there the day after the storm?
11	Q And you state in the second paragraph, you say, "I told Mike not to worry as I reviewed his pumps yesterday and they were as agreed upon at the meeting." The sentence before it says, "The City had two men looking over the pumps and making sure they were where the plans showed they were." So it was your understanding the City was looking over the pumps on the day after the storm?	11	A I don't remember I'm just referring to my notes here.
12		12	Q Your note says they were gone?
13		13	A Yes.
14		14	Q If there were no pumps in front of
15		15	Mr. Showers' building on June 13, 2008,
16		16	which you were told that, there's nothing to
17		17	get the water out in front of his building
18		18	as per the plan; right?
19		19	MR. DUDAS: Object to form.
20	A It says so in the Diary.	20	
21	Q And you told Mike Ramuta not to worry about what?	21	A At the moment they weren't in there. I
22		22	don't know how long they weren't in there.
23	A Because I reviewed his pumps yesterday and they were as agreed upon at the meeting.	23	Q If pumps aren't there, that's the only
24		24	method to get the water out, so it's not
25	Q Mike says to you the City was worried about	25	going to move; right?

920-783-1835

HENES & ASSOCIATES

Page 103

800-434-8911

of 13

A.App.00084



STATE OF WISCONSIN: CIRCUIT COURT: WINNEBAGO COUNTY

ANDREW J. KOSOWSKI, LLC
KOSOWSKI, LLC, and
KOSOWSKI, LLC, and
KOSOWSKI, LLC, and

Defendants,

Case No. 10-17-107

CITY OF OSHKOSH, WISCONSIN
KOSOWSKI, LLC, and
KOSOWSKI, LLC, and
KOSOWSKI, LLC, and
KOSOWSKI, LLC, and

Defendants.

Deposition of Peter Gulbrunson, before
ANDREW J. KOSOWSKI, LLC, a Civil Engineer and Survey
Public in and for the State of Wisconsin, under and
pursuant to Section 804, Wisconsin Statutes, and the
rules made at the City of Oshkosh City Hall, 215
North Adams, Room 304, Oshkosh, Wisconsin, on the
9th day of December, 2010, commencing at 1:00 p.m. and
concluding at 4:04 p.m.

ANDREW J. KOSOWSKI, LLC

ANDREW J. KOSOWSKI, LLC, a Civil Engineer and Survey
Public in and for the State of Wisconsin, under and
pursuant to Section 804, Wisconsin Statutes, and the
rules made at the City of Oshkosh City Hall, 215
North Adams, Room 304, Oshkosh, Wisconsin, on the
9th day of December, 2010, commencing at 1:00 p.m. and
concluding at 4:04 p.m.

ANDREW J. KOSOWSKI, LLC, a Civil Engineer and Survey
Public in and for the State of Wisconsin, under and
pursuant to Section 804, Wisconsin Statutes, and the
rules made at the City of Oshkosh City Hall, 215
North Adams, Room 304, Oshkosh, Wisconsin, on the
9th day of December, 2010, commencing at 1:00 p.m. and
concluding at 4:04 p.m.

TRANSCRIPT OF PROCEEDINGS

Peter Gulbrunson, called as a witness
herein, being first duly sworn, was examined and
testified as follows:

O-S-H-K-O-S-H

BY MR. KOSOWSKI:

Q. Could you please state your name and spell your
last name for the record?

A. Peter Gulbrunson, G-u-l-b-r-u-n-s-o-n.

Q. And for the record, could you please give your
current home address?

A. 2901 Sullivan Avenue, Kaukauna.

Q. Mr. Gulbrunson, have you ever had your deposition
taken before?

A. No.

Q. Standard in every deposition, we always just kind
of lay out some general ground rules about what
depositions are about so the deponent understands
what's going to happen. Basically I'm going to
ask a series of questions of you, and one thing
that we always ask that deponents do is answer
with a yes or a no or an affirmative response as
opposed to phrases or head nods. You understand
that?

A. Yeah.

ANDREW J. KOSOWSKI, LLC, a Civil Engineer and Survey
Public in and for the State of Wisconsin, under and
pursuant to Section 804, Wisconsin Statutes, and the
rules made at the City of Oshkosh City Hall, 215
North Adams, Room 304, Oshkosh, Wisconsin, on the
9th day of December, 2010, commencing at 1:00 p.m. and
concluding at 4:04 p.m.

ANDREW J. KOSOWSKI, LLC, a Civil Engineer and Survey
Public in and for the State of Wisconsin, under and
pursuant to Section 804, Wisconsin Statutes, and the
rules made at the City of Oshkosh City Hall, 215
North Adams, Room 304, Oshkosh, Wisconsin, on the
9th day of December, 2010, commencing at 1:00 p.m. and
concluding at 4:04 p.m.

ANDREW J. KOSOWSKI, LLC

ANDREW J. KOSOWSKI, LLC, a Civil Engineer and Survey
Public in and for the State of Wisconsin, under and
pursuant to Section 804, Wisconsin Statutes, and the
rules made at the City of Oshkosh City Hall, 215
North Adams, Room 304, Oshkosh, Wisconsin, on the
9th day of December, 2010, commencing at 1:00 p.m. and
concluding at 4:04 p.m.

ANDREW J. KOSOWSKI, LLC, a Civil Engineer and Survey
Public in and for the State of Wisconsin, under and
pursuant to Section 804, Wisconsin Statutes, and the
rules made at the City of Oshkosh City Hall, 215
North Adams, Room 304, Oshkosh, Wisconsin, on the
9th day of December, 2010, commencing at 1:00 p.m. and
concluding at 4:04 p.m.

ANDREW J. KOSOWSKI, LLC, a Civil Engineer and Survey
Public in and for the State of Wisconsin, under and
pursuant to Section 804, Wisconsin Statutes, and the
rules made at the City of Oshkosh City Hall, 215
North Adams, Room 304, Oshkosh, Wisconsin, on the
9th day of December, 2010, commencing at 1:00 p.m. and
concluding at 4:04 p.m.

Q. The simple reason is that she can't take down
head nods and uh-huhs, and it doesn't make any
sense in the record, okay?

A. Okay.

Q. And if you need longer or time to talk with your
counsel, let me know and we'll do so, all right?

A. Okay.

Q. What is your current occupation?

A. I'm a civil engineer 2 for the City of Oshkosh.

Q. And how long have you been in that position,
sir?

A. Three and a half years.

Q. And how long have you been with the City of
Oshkosh?

A. Three and a half years.

Q. And prior to being with the City of Oshkosh, was
there any other?

A. Grad, Jellat, Scholmer, an engineering
consulting firm.

Q. Where is that out of, sir?

A. Green Bay.

Q. And what was your position there?

A. Project manager.

Q. How long were you there?

A. Seven years.

1 Q. Were some of the box culverts, were those raised
2 above the subsurface level?
3 A. To the best of my knowledge, yes.
4 Q. So there was manholes and box culverts that were
5 raised higher than the subsurface conditions that
6 you personally saw yourself?
7 A. Yes.
8 Q. And you're an engineer, right?
9 A. Correct.
10 Q. And you were an engineer in 2008, right?
11 A. Correct.
12 Q. And at that time, did you have knowledge as to
13 whether or not having box culverts and storm
14 sewers above subsurface grade was a good idea or
15 a bad idea?
16 A. He brought it to the Mason Bros.' attention,
17 so the fact that those were above subsurface
18 grade you thought was a concern?
19 A. Yes.
20 Q. Would you say in your experience as an engineer
21 that the fact that the storm sewer had been
22 disconnected and the -- on Ohio Street, and that
23 the box culverts and manholes were above
24 subsurface conditions essentially rendered the
25 existing storm sewers that drained into

25

1 did?
2 A. I don't know if they had some temporary
3 connections hooked up or they had means of
4 conveying the water.
5 Q. Assuming that they were not connected -- the side
6 streets were not connected onto the main street
7 of Ohio Street, presuming that they weren't,
8 would the side streets have been compromised by
9 the fact that they weren't connected to
10 Ohio Street?
11 A. URS: Object to four.
12 A. If there was no pumping or temporary hookups,
13 they would be compromised.
14 A. RESTATE:
15 Q. So the city of Oshkosh saw a rainstorm that
16 occurred in June of 2008, more specifically
17 June 8th of 2008 is the first one, correct?
18 A. I would have to check my records, I guess.
19 Q. I'll represent to you, and I think through this
20 case we've talked a lot about this, there was the
21 first rainfall that occurred June 8th of 2008,
22 okay? And after that rainstorm did the city, to
23 your knowledge, express some concern about the
24 fact that the side streets were not properly
25 draining into Ohio Street?

27

1 Ohio Street useless?
2 A. I wouldn't say useless. If they would have
3 pumped. But that all comes to means and methods,
4 and we can't tell the contractor what to do
5 because of means and methods.
6 Q. But in your experience as an engineer, would you
7 say that the streets going from the east and west
8 that funnel into the Ohio Street storm sewer were
9 compromised by the fact that Ohio Street was
10 disconnected and that the manholes and box
11 culverts were above grade?
12 A. URS: Object to four.
13 A. It is the responsibility of the general
14 contractor to maintain drainage off the side
15 streets on the reconstruction project per
16 standard specs.
17 A. RESTATE:
18 Q. And so by the contractor -- I guess strike that.
19 Did the contractor maintain drainage from the
20 side streets onto the main street, to your
21 knowledge?
22 A. I was not in charge of that section, so I don't
23 know if they had temporary connections hooked up
24 or not.
25 Q. You don't have any knowledge whether or not they

26

1 A. Correct.
2 Q. And one of the things that the city brought to
3 the attention of the contractor was that it may
4 be a good idea to pump water out of the storm
5 sewer into the street, correct?
6 A. It was just our idea, no. We said they should
7 pump it to the downstream storm sewer. And it
8 was Mason Bros. to come up with a plan of
9 attack.
10 Q. So the city tells Mason that you need to pump it
11 out of the storm sewer into the street, and
12 however Mason Bros. did that, that was up to
13 them, correct?
14 A. Coming down to means and methods, correct.
15 Q. I guess by virtue of the city telling Mason that
16 they must pump out of the storm sewer, I think
17 the logical conclusion in my mind is that the
18 storm sewer is disconnected otherwise, there
19 wouldn't be a need to pump out water out of the
20 storm sewer and onto the street, right?
21 A. If the storm sewer wasn't connected, pumping
22 would be one of the only means.
23 Q. Do you have an opinion whether or not pumping
24 is -- has sufficient means to pump the water away
25 the street in a storm that occurred similar to June

28

12/9/10

1 best way to do things is to keep up" -- strikes
2 that, "is to keep everything caught up on in one-
3 or two-block segments. The storm needs to be
4 caught up so the water can be directed into the
5 new system and off the project." Do you see
6 that?

7 A. Yes.

8 Q. First off, were you part of that conversation
9 where it was agreed to do things in one- or
10 two-block segments?

11 A. It was discussed at the preconstruction meeting
12 that they would do it on a block-by-block
13 basis.

14 Q. And I'm assuming that at this meeting on
15 April 23rd, 2008 it was discussed again?

16 A. I guess so, yes.

17 Q. And do you know what they mean by the statement,
18 "the storm needs to be caught up so the water can
19 be directed in the new system and off the
20 project"? Do you remember that discussion?

21 A. Not offhand, no.

22 Q. Do you know what they mean by that? Did you have
23 any understanding as to why that was talked
24 about?

25 A. The storm was probably not being done block to

21

1 Q. And the fact that at this April 23rd meeting
2 they're talking about the fact that the storm
3 needs to be caught up so that water can be
4 directed into the new system, basically that's
5 saying that the old storm sewer system has been
6 disconnected, correct?

7 A. I don't know where the storm sewer was at that
8 time.

9 Q. Do you have any knowledge as to where -- When you
10 say you don't have any knowledge, you don't have
11 any knowledge as to where the old storm sewer was
12 disconnected?

13 A. Correct. We weren't overseeing that.

14 Q. But you had knowledge that at some point it was
15 disconnected, right?

16 A. During construction it's going to be reconnected,
17 yes.

18 Q. But it was disconnected and portions of it were
19 not reconnected during the construction, correct?

20 A. Correct.

21 Q. And in your opinion, was it important to maintain
22 connection of the storm sewer during the project?

23 A. That's all means and methods of the contractor.

24 Q. But you knew this was going on, right, that it
25 was disconnected?

22

1 block.

2 Q. Was that your understanding?

3 A. Being reconstructed.

4 Q. Was that your understanding, that the storm sewer
5 was not being done block by block?

6 A. That is my understanding, yes.

7 Q. And when -- for the record, when a storm is not
8 done block by block, what does that mean?

9 A. It means that block is not hooked up to the rest
10 of the system.

11 Q. So would that mean that the contractor has
12 removed all of the road along Ohio Street and it
13 has not done it block by block like they agreed
14 to?

15 A. Can you rephrase that?

16 Q. Is it your understanding in this project on
17 Ohio Street that the contractor removed all of
18 the road at one time?

19 A. He did not remove all the road at one time.

20 Q. Did they remove it more than block by block?

21 A. There has more than one block exposed at any
22 given time, yes.

23 Q. And was that contrary to what was talked about at
24 the preconstruction meeting?

25 A. Yes.

22

1 A. Yes.

2 Q. And you thought it was important enough to bring
3 to the attention of the DOT, correct?

4 A. We asked them why they weren't doing it block
5 by block like they said they were going to,

6 yes.

7 Q. And that raised some concern to the city that
8 they weren't doing what they agreed to at the
9 preconstruction meeting, correct?

10 A. It raised a red flag, yes.

11 Q. And when we say they, we mean Mission Bros.,
12 right?

13 A. The contractor, yes.

Bros., right?

I was removed from Ohio Street at
times, do you have any knowledge as to
if the storm water inlets were raised
they removed the road?

We didn't oversee that portion of

Physically see that that was the
same manholes that were higher than
the sidewalk?

25 A. Yes. There were manholes.

DEPOSITION OF PETER GULBERGSON - 12/9/10

1 Q. You knew it was important to have enough, but you
2 didn't know how many?
3 A. We were only overseeing the sanitary on this
4 project.
5 Q. I understand you're only overseeing the sanitary
6 on the project, and that was important. I
7 understand that's your forte, right? Yes?
8 A. That was the city's responsibility on this
9 project, was the sewer and water. The storm
10 sewer was done under the DOT contract.
11 Q. That's what you guys are responsible for, right?
12 A. We inspected the sanitary and the water.
13 Q. The question that comes to my mind is this: Why
14 are you meeting with the DOT and Mueson Bros.
15 regarding pumps for the storm sewer system if
16 you're not responsible at all for the storm sewer
17 system on this project?
18 A. We had concerns.
19 Q. What concerns did you have?
20 A. That the storm sewer was not hooked up.
21 Q. What was your anticipated concern or result that
22 could happen if the storm sewer wasn't hooked up
23 and there wasn't pumps?
24 A. You would get some localized flooding.
25 Q. And did you think about -- Did you anticipate

41

1 that the localized flooding could be worse than
2 what it would have been if the storm sewer system
3 was connected?
4 A. Can you repeat that question?
5 Q. Were you concerned that the flooding that could
6 occur on Ohio Street could have been worse than
7 if the storm sewer was connected?
8 A. If they would have had means of conveying the
9 water while it was disconnected.
10 Q. But you were concerned, or the city was concerned
11 that if you didn't sit down with Mueson and get a
12 good grip on the fact that they had pumps in
13 place, you were concerned that the flooding could
14 be widespread, like you said?
15 A. We asked them what they were going to do to help
16 the drainage, and that was the purpose of that
17 meeting.
18 Q. By this time on June 22nd of 2008, the city was a
19 little unhappy with Mueson Bros., correct?
20 A. MR. GULBERGSON: Object to form.
21 A. We had some concerns, yes.
22 MR. ROSENBAUM:
23 Q. The city kind of felt as though based upon its
24 concerns with Mueson over the past few months
25 before, that it needed to look a little bit more

42

1 closely into what Mueson was doing to make sure
2 they did the right thing, right?
3 MR. GULBERGSON: I'm going to object.
4 Object to the form of the question.
5 MR. ROSENBAUM:
6 Q. You can answer.
7 A. We had concerns that the project was continuing
8 differently than how they said they were going to
9 do it.
10 Q. In fact, in Ryan Schenck's notes on his daily
11 reports, he talks about some conversations with
12 you, and he talks about the fact that you asked
13 him whether or not the DOT could actually shut
14 Mueson Bros. down because of your concerns,
15 right?
16 A. I asked him if there was a possibility of having
17 them shut down to get caught up like they said
18 they would at the preconstruction meeting.
19 Q. Why would you want them shut down?
20 A. To get the storm sewer caught up.
21 Q. Because you knew if the storm sewer wasn't caught
22 up, what could happen?
23 A. There was potential flooding.
24 Q. In fact, I believe you approached the DOT about
25 shutting down Mueson Bros. several weeks before

43

1 the June 2008 floods, correct?
2 A. I don't know the date. I asked Ryan at one time
3 if they could shut down future operations until
4 they'd get caught up like they said in the
5 preconstruction meeting, and I was told at that
6 time that it's means and methods of the
7 contractor, and they're ultimately responsible
8 for the drainage of the road, and how they want
9 to do the construction is up to them. He cannot
10 tell them how to construct the road.
11 Q. So you were told that it's a means and methods thing
12 for the DOT -- it's a means and methods decision
13 for the contractor prior to the June 2008 floods,
14 correct?
15 A. Correct.
16 Q. Despite knowing that it was a means and methods
17 decision of the contractor, the city still
18 thought it needed to double check and make sure
19 that Mueson Bros. was going to do something to
20 prevent this widespread flooding being that the
21 storm sewer was disconnected, correct?
22 A. We had concerns, and we asked them what they were
23 going to do to alleviate some of the flooding,
24 yes.
25 Q. So even though you knew they had means and

44

DEPOSITION OF PETER GULBRONSON - 12/9/10

1 to alleviate it.
2 Q. But you felt some pressure that you needed to
3 make sure that citizens are protected, correct?
4 A. Were we directed to do this? No.
5 Q. But you felt as though you needed to do that?
6 A. We inquired about what they're going to do to
7 solve the situation based on future forecasts.
8 Q. Do you have knowledge as to whether or not the
9 side streets, I'll call them, that run from east
10 to west across Ohio Street, whether or not the
11 pavement remained on those side streets across
12 Ohio Street during the construction period?
13 A. 6th Street I believe was left open per the
14 specials of the contract. 3rd and 4th were
15 closed at Ohio Street.
16 Q. So they were -- And one of the city's thoughts
17 was that pumping the water down Ohio Street was
18 the option to take here in order to prevent --
19 or because the storm sewer system was out,
20 correct?
21 A. That was an option that was presented to us.
22 Q. And did you take into consideration the fact that
23 6th Street remained in place and some of the
24 other streets remained in place, and there would
25 be high points there where the water may not be

1 down Ohio Street?
2 A. Typically intersections are designed so water
3 doesn't flow through the intersections, so water
4 wouldn't have flowed across those if they were
5 left in.
6 Q. So the theory of gravity flow down Ohio Street
7 would have been compromised because of the
8 streets being left in place?
9 A. MR. REED: Object to form. Go ahead.
10 A. It would flow from block to block.
11 MR. REED:
12 Q. When it got to the block where the street was
13 left in place, it would potentially stop there?
14 A. Potentially, yes. It would be picked up by an
15 inlet typically.
16 Q. If the inlet was open?
17 A. Correct.
18 Q. And we know in this situation the inlet was not
19 open, correct?
20 A. Don't know. I was not inspecting that portion of
21 it, if they had temporary connections to the
22 inlets or not.
23 Q. But we know that portions of Ohio Street inlets
24 were disconnected, right?
25 A. There were portions, yes.

51

1 able to flow over the top of those streets?
2 A. It was discussed that they may have to pump from
3 one pump to another.
4 Q. And what do you mean by pump from one pump to
5 another?
6 A. Because 6th was left open to traffic, they would
7 have to pump from 7th to 6th and then from 6th
8 down to 5th or then to the existing storm
9 sewer.
10 Q. So kind of like a train effect; one pump to the
11 other to the other, right?
12 A. Correct.
13 Q. That would only allow the water pumped from the
14 actual pump to flow down the street, but there's
15 also the natural flow of water, right?
16 A. Portions of the side streets flow back to
17 Ohio Street, yes.
18 Q. One form of drainage during a construction
19 period, in your knowledge as an engineer, would
20 be just gravity flow down the street where the
21 water just flows down the street, correct?
22 A. That is one form, yes.
23 Q. Do you have an opinion as to whether or not the
24 leaving of the east/west streets in place across
25 Ohio Street would impede or impact gravity flow

1 Q. I guess at this meeting on June 12th or 2008 with
2 the DOT and Mueson Bros. at the 6th Street DOT
3 office, was it a friendly meeting, was it a
4 heated meeting? Do you kind of have a
5 recollection? Was everybody kind of getting
6 along, we got to come up with a plan, or was
7 there disagreement as to what should happen?
8 A. I don't recall. It was probably some
9 disagreement. There was probably some
10 discussion.
11 Q. Do you know what the disagreement would have been
12 over?
13 A. Probably number of pumps, placement of those,
14 responsibility.
15 Q. Do you recall if Mueson Bros. was concerned about
16 the cost of getting these pumps in and who was
17 going to pay for them?
18 A. That may have been brought up.
19 Q. So it's something that you're not quite sure, but
20 you think that would have been brought up, when
21 you say may?
22 A. It's potential that it could have been brought
23 up, yes. I don't recall.
24 Q. I think I read in the DOT notes somewhere that
25 Ryan Schaeffer said that Mueson expressed, you

52

1 A. There's rich blood and there's Paul Wolf.
2 Q. Isn't it true because when the storm sewer is
3 flowing into the sanitary sewer, that that's
4 extra water that's going through the storm sewer
5 against the taxpayers have to pay for?
6 A. Can you repeat that question?
7 Q. I mean, if you know the answer. I'm not trying
8 to be tricky on this. I mean, if the storm sewer
9 is going into the sanitary sewer, there's extra
10 stuff in the sanitary sewer which as a sewer
11 district has to pay for that, and it's taxpayers
12 that have to pay for that, right?
13 A. It has to be treated, yes.
14 Q. So if there's more water being -- taxpayers are
15 paying more money during that period of time to
16 treat the water that Muscon was putting down the
17 sanitary sewer, correct?
18 A. (MUSCON) I'm going to object to the
19 question.
20 A. There is a set rate for sewer.
21 A. (MUSCON) I think people pay --
22 A. It's a set rate based on cubic footage.
23 A. (MUSCON) Based on their water
24 usage.
25 A. Based on their water usage.

85

1 A. (MUSCON) I don't know what --
2 A. It's so many dollars per hundred cubic feet of
3 water usage.
4 A. (MUSCON)
5 Q. In one of Ryan Schuchter's notes, the one dated
6 June 10th, 2008, it says that -- it says, talking
7 about you, it says "his inspectors and Pete have
8 been on the job every day for two months watching
9 them build utilities and pull them out of the
10 storm sewer. If they were worried about this,
11 why wasn't it ever mentioned prior to five inches
12 of rain?" And this was stated on June 10th of
13 2008, and this was Ryan Schuchter saying that.
14 I guess he's kind of what I'll call upset with
15 you calling him out on the -- on something. I
16 don't know what it is. But I guess the first
17 question to you is, he says that you guys --
18 "Pete and his people have been on the job every
19 day for two months watching them build utilities
20 and pull out the storm sewer." I mean, would you
21 agree with him that you and the city -- other
22 employees, inspectors, were on the job every day
23 for two months?
24 A. Our sewer and water inspectors are present when
25 sewer and water -- sanitary sewer and water work

86

1 are being constructed.
2 Q. And would you agree with his statement that your
3 people had watched the Muscon people pull out the
4 utilities and storm sewer?
5 A. I believe the sanitary was going -- or this
6 existing storm was, so as they were constructing
7 the sanitary, the storm was being removed.
8 Q. And now they're kind of -- Ryan's from my
9 impression here saying why are you bringing it up
10 now at the fifth hour on June 10th of 2008. I
11 guess here's my impression, correct me if I'm
12 wrong: Marc Miller testified today earlier, said
13 that he expressed some concern to Muscon Bros.
14 regarding the storm sewer disconnect, you know,
15 back in maybe April of 2008. Would you agree
16 that that was when Muscon was first made aware of
17 this issue?
18 A. We were told at the preconstruction conference
19 that they would do block to block, and that at
20 any given time only one block of storm sewer
21 would be disconnected, and then a pump could be
22 set up to drain the rest of it. And they
23 continued with the sanitary sewer. We questioned
24 it, but again, that comes down to means and
25 methods.

87

1 Q. So you would agree with Marc that it was well
2 prior to the June floods that Muscon was made
3 aware of this?
4 A. The sanitary was constructed first on this
5 project, because it was the deepest utility,
6 which in effect took out the storm sewer. And
7 whenever the sanitary sewer construction started,
8 the storm sewer was removed. I'm not sure of the
9 date it was started on, but it would have been
10 first.
11 Q. And on June 10th, 2008, Ryan Schuchter says in
12 his notes, "Pete," which I think he's referring
13 to you again, "mentioned that Muscon would not be
14 allowed to pump into the sanitary any more unless
15 it was contaminated. He claimed they told him it
16 was in the BMP and they could do it. I told
17 Pete that it was not part of the BMP to pump
18 clean water into the sanitary, and it's up to the
19 city to police their sewer." I mean, is that
20 similar? I mean, is that a dispute you guys are
21 having over pumping into the sanitary sewer, what
22 you were talking about?
23 A. When you would hit contaminated soils and
24 contaminated groundwater from old gas stations,
25 it has to get pumped to the sanitary because of

88

DEPOSITION OF MARK MILLER

EXHIBIT

25

STATE OF WISCONSIN : CIRCUIT COURT : WINNEBAGO COUNTY

SHIRLEY REED, INC.,
222 WASHINGTON, LLC, and
MARK W. SHIVERS,

COPY

Plaintiffs,

Case No. 03-CV-1458

-vs-

DEPOSITION OF:
MARK MILLER
December 5, 2010

CITY OF OSHKOSH, WISCONSIN
RECS., INC., WEST END
MUTUAL INSURANCE COMPANY,
and LESSEE OF WISCONSIN
WATERMAINTENANCE MUTUAL INSURANCE,

Defendants.

Deposition of MARK MILLER, before DEAN
M. BROWN-SCHWENK, a Court Reporter and Notary Public
in and for the State of Wisconsin, under and pursuant
to Section 904, Wisconsin Statutes, and the rules
thereunder, at the City of Oshkosh City Hall, 215 Main
Avenue, Room 308, Oshkosh, Wisconsin, on the 5th day
of December, 2010, commencing at 10:12 a.m. and
concluding at 12:47 p.m.

A-P-P-E-A-R-A-N-C-E-S

DEAN M. BROWN-SCHWENK, Notary Public,
by DANIEL J. ROSENBERG, Attorney-at-Law
One East Avenue, Suite 302
P.O. Box 106
Oshkosh, Wisconsin 54901-0106
appeared on behalf of the Plaintiffs

SILVIO, BETTERT & CARLSON, S.C., by
RICHARD CARLSON, Attorney-at-Law
331 East Washington Street
Appleton, Wisconsin 54911
appeared on behalf of the Defendants,
City of Oshkosh and Lessee of Wisconsin
Watermaintenance Mutual Insurance

DEPOSITION OF DEPENDENT

MARK MILLER, called as a witness

beginning at 10:12 a.m. and concluding and
testified as follows:

EXAMINATION

BY MR. ROSENBERG:

Q. Please state your name, spell your last name for
the record, sir.

A. Mark Miller, M-I-L-L-E-R.

Q. And for the record, what is your current home
address?

A. 136 Liberty Street, Oshkosh, Wisconsin.

Q. And have you ever had a deposition taken before?

A. No.

Q. This is standard in every single deposition.

Attorneys start the deposition by just telling

the deponent a few ground rules of what

depositions are about so you understand what's

going to happen today. Basically I'm going to

ask you a series of questions, and one of the

main things that we need to do in depositions is

provide verbal affirmative responses to my

questions. More specifically, you know, head

nods and uh-huhs cannot be taken down on the

record. It gets confusing. So if you can answer

with a verbal response, that would help everybody
out tremendously, okay?

A. Okay.

Q. The other one is, if you don't understand a

question, please ask me to rephrase it and I'll

do so. One of the things is that if you answer a

question thinking you understand my question even

though you don't understand the question I've

asked, the record will show that you understood

it. So just ask me to rephrase and I'll do so,

okay?

A. Okay.

Q. Need my breaks, we will do so. I don't

anticipate this taking forever, but if you need a

break to either use the rest room or confer with

your counsel, let me know and we'll do so. All

right?

A. Okay.

Q. Your current occupation is?

A. Water maintenance for the City of Oshkosh.

Q. And are you by trade an engineer?

A. No.

Q. What is your degree in?

A. I have no degree.

Q. So you have training in a certain area though?

ROSENBERG, DANIEL J. ROSENBERG, S.C., by
DAVID DRIES, Attorney-at-Law
47 Park Place
P.O. Box 106
Appleton, Wisconsin 54911-0106
appeared on behalf of the Defendants,
Shirley Reed, Inc. and West End Mutual
Insurance Company

ALSO PRESENT: Mark W. Shivers

EXHIBITS

EXHIBIT NO. 1 - Deposition Report, 5/15/08
EXHIBIT NO. 2 - City of Oshkosh, Wisconsin, Water
Maintenance Plan Map
EXHIBIT NO. 3 - Six color photos

EXHIBIT NO. 4 - Six color photos

EXHIBIT NO. 5 - Six color photos

EXHIBIT NO. 6 - Six color photos

EXHIBIT NO. 7 - Six color photos

EXHIBIT NO. 8 - Six color photos

EXHIBIT NO. 9 - Six color photos

EXHIBIT NO. 10 - Six color photos

EXHIBIT NO. 11 - Six color photos

EXHIBIT NO. 12 - Six color photos

EXHIBIT NO. 13 - Six color photos

EXHIBIT NO. 14 - Six color photos

EXHIBIT NO. 15 - Six color photos

EXHIBIT NO. 16 - Six color photos

EXHIBIT NO. 17 - Six color photos

EXHIBIT NO. 18 - Six color photos

EXHIBIT NO. 19 - Six color photos

EXHIBIT NO. 20 - Six color photos

EXHIBIT NO. 21 - Six color photos

EXHIBIT NO. 22 - Six color photos

EXHIBIT NO. 23 - Six color photos

EXHIBIT NO. 24 - Six color photos

EXHIBIT NO. 25 - Six color photos

COLLEEN REED REPORTING (414) 967-0368

A.App.00091

1 Q. When you say the water main ditches, I don't
2 know what that means. What is water main
3 ditches?
4 A. Where the new water main was installed and they
5 excavate the ground out, if it settles or
6 whatever, they have to keep it --
7 Q. So it's your understanding that in any state
8 highway project, that the contractor must
9 maintain drainage where they pull out -- where
10 the water mains are being dug as ditches,
11 correct?
12 A. Correct.
13 Q. And you've had experience in other state
14 highway projects in the City of Oshkosh besides
15 Ohio Street, correct?
16 A. Yes.
17 Q. And have you seen what other contractors have
18 done to maintain drainage while they're removing
19 water mains and putting new water mains in?
20 A. When you're installing new water main and they
21 backfill over the top of the new water main, and
22 it's compacted and everything, it's just a gravel
23 road. There is no, you know, water running down
24 that ditch.
25 Q. When you say a water ditch, is there some -- the

1 though you may not have professional expertise on
2 that? For example, on Main Street did you see
3 how they did that?
4 A. It was more or less the road was just kept kind
5 of a -- somewhat of a grade.
6 Q. When you say somewhat of a grade, you mean just
7 it was kept level so the drainage could flow over
8 the top of it, is that what you're saying?
9 A. Yes. To the catch basins and stuff.
10 Q. And was the Main Street project kind of done more
11 on a piece-by-piece or block-by-block basis, to
12 your knowledge?
13 A. Yes.
14 Q. And do you think that was beneficial for the
15 Main Street project to do it in that regard,
16 as far as the water main?
17 A. Yeah.
18 Q. Yes.
19 Q. And why is that?
20 A. Just due to all the services and water
21 laterals.
22 Q. Because if you'd rip up the whole entire street
23 at the same time, nobody would have water for a
24 period of time, is that a fair statement?
25 A. Everybody would have water, but it's just for

1 water ditch would be before the water main is put
2 in, correct? Is that what you're referring to as
3 a water ditch?
4 A. Yep.
5 Q. So there may be a period of time, maybe several
6 days, several weeks, whatever it may be, where
7 there's a ditch in the roadbed where the water
8 main is going to be placed in, correct?
9 A. They will excavate it out and then install the
10 pipe, backfill it tight up to their subgrade.
11 And as far as in a standing ditch, no. Very
12 rarely.
13 Q. And you said in your prior testimony that you
14 have some understanding as to what construction
15 contractors must do on a state highway project to
16 maintain drainage when they're doing these water
17 ditches, correct?
18 A. As far as -- Can you rephrase that? Are you
19 talking like rainwater or runoff, what?
20 Q. Yeah. Rainwater and runoff, either/or, or both.
21 A. Now they have to maintain that, no. I don't
22 know.
23 Q. You don't know the specifics on that?
24 A. No, I don't.
25 Q. Have you ever seen how they maintain that, even

1 turning valves and stuff, as far as shutting
2 valves off and on, control the old water main.
3 MR. JOSEPH: Just off the record.
4 (Discussion held off the record.)
5 Q. I guess with respect to the knowledge that you
6 have regarding the State of Wisconsin standards
7 for maintaining drainage during construction, do
8 you have any knowledge as to what was done on
9 Ohio Street in that regard by Larson Bros. to
10 maintain drainage?
11 A. No, I do not.
12 Q. Did you witness Larson Bros. disconnect the storm
13 water utility on Ohio Street?
14 MR. JOSEPH: Object. There is no storm
15 water utility.
16 MR. JOSEPH:
17 Q. Storm water system on Ohio Street: did you
18 witness them disconnect that?
19 A. Do you have a document or something saying that I
20 did that I can help refresh my memory?
21 Q. Sure thing. Back this.
22 (Exhibit 1 marked for identification.)
23 Q. Showing to you what has been marked as
24 Exhibit No. 1. Do you recognize what this
25 document is, Mr. Miller?

1 A. Yes, I do.
 2 Q. And what is it?
 3 A. It is a daily inspection report filled out by
 4 Randy Peterson.
 5 Q. And who is Randy Peterson, to your knowledge?
 6 A. He is an inspector for the engineering department
 7 for the City of Oakbrook.
 8 Q. Turn your attention to the handwritten notes in
 9 the second paragraph towards the bottom of this
 10 document where it states "Hasson was told by
 11 Marc Miller and myself that the storm mains
 12 should be looked back up." Do you see that?
 13 A. Yes, I do.
 14 Q. Do you agree that you were present when
 15 Randy Peterson and/or yourself informed Hasson
 16 that they should look up the storm water main?
 17 A. Yes.
 18 Q. And do you know who was present during that
 19 conversation?
 20 A. Randy Peterson, myself, and Mike Bernada.
 21 Q. And do you know where you were located when you
 22 had that conversation, on the street or in your
 23 office, or where were you located?
 24 A. It was on the corner of 3rd and Ohio.
 25 Q. And was that a planned meeting that you decided

11

1 A. To the storm main, the head.
 2 Q. And if you saw a map, could you show me where
 3 that was located?
 4 A. I --
 5 (Exhibit 2 marked for identification.)
 6 Q. Showing to you now what's been marked as
 7 Exhibit No. 2. Do you recognize the location
 8 where that map depicts?
 9 A. Yeah. Yes.
 10 Q. And it's Ohio Street?
 11 A. Yes.
 12 Q. Could you use my pen and mark where you -- what
 13 you -- could you mark what you just described?
 14 A. In this area right here.
 15 Q. And that's what?
 16 A. 3rd.
 17 Q. That's the catch basin?
 18 A. Yes.
 19 Q. And what was going on with the catch basin?
 20 A. The pipe that goes from the catch basin to the
 21 storm main.
 22 Q. Was disconnected?
 23 A. Was disconnected.
 24 Q. And where is the storm main that you're referring
 25 to?

12

1 to meet at 3rd and Ohio, or just was it kind of
 2 happenstance that you showed up there and saw
 3 them?
 4 A. We all just happened to be in that general area
 5 at that time.
 6 Q. And so you and Randy decided to walk up to
 7 Mark Bernada and talk to him about the
 8 disconnection of the storm water system?
 9 A. Mike Bernada.
 10 Q. Sorry. Mike Bernada. You and Randy decided to
 11 walk up to Mike Bernada and confront him about
 12 this?
 13 A. Yes.
 14 Q. What conversations did you have with
 15 Randy Peterson prior to confronting Mike Bernada
 16 regarding the disconnection of the storm water
 17 system, if you recall?
 18 A. There was no discussion.
 19 Q. Did you both walk -- did you both witness that
 20 it was disconnected prior to confronting
 21 Mike Bernada?
 22 A. I was present when from the catch basin to the
 23 main they tore through that portion of the storm
 24 to relay the water main.
 25 Q. From the catch basin to the where?

13

1 A. I'm not really sure if this is the new main or if
 2 this is the old main that is on this map.
 3 Q. I guess to your knowledge, where would the storm
 4 main have been?
 5 A. The old storm was toward the center of the road
 6 north.
 7 Q. And it was disconnected at the catch basin, was
 8 it disconnected at another point too?
 9 A. They disconnected it in a couple different spots
 10 on 4th. All the catch basins that went to the
 11 west, because the water main was relaid on the
 12 west side here, any catch basin they basically
 13 tore the pipe out and didn't make a temporary
 14 connection.
 15 Q. Could you just draw generally on here where the
 16 other catch basins were, where they were
 17 disconnected?
 18 A. Not -- I don't know exactly without looking at it
 19 where they were. But I mean, they were middle of
 20 at the corners.
 21 Q. Can you just draw generally? I'm not going to
 22 hold you to it, but just generally where you had
 23 a rough idea where that was? You have three
 24 circles drawn on Exhibit No. 2?
 25 A. Right.

14

1 Q. Was there any other circles, that you recall?
2 A. No.
3 Q. And when you say that they were disconnected at
4 those points, what did they do to disconnect it?
5 A. It was when the backhoe dug, if your pen would be
6 a pipe, when they dug through it hit storm pipe
7 from the catch basin going to the storm main, and
8 tore it out. They rebed the new water main and
9 then backfilled the ditch.
10 And at that point, that is when I
11 mentioned to Mike that there should be a
12 temporary connection made from that catch basin
13 to that storm.
14 Q. So you saw the -- I'll call it the old storm
15 water pipe removed and pushed off to the side,
16 correct?
17 A. Correct.
18 Q. Did you actually see it on the side of the road
19 and removed?
20 A. It was loaded into one of the dumps and hauled
21 off.
22 Q. Into one of the dump trucks?
23 A. Yes.
24 Q. So you saw it being put into a dump truck and
25 being hauled off?

21

1 A. Yes.
2 Q. And then you also saw that they had placed a new
3 storm water pipe in the ground, correct?
4 A. No.
5 Q. You didn't witness that in there? No?
6 A. They weren't laying the pipe at that time.
7 Q. So the old one was out and there wasn't a new one
8 in there to replace the old one, correct?
9 A. Correct.
10 Q. When you say at that point in time there wasn't a
11 new one, is that on or about the time when you
12 and Randy Peterson had a conversation with
13 Mike Bernick?
14 A. Yes.
15 Q. And that would have been on May -- on or about
16 May 16th, 2008?
17 A. It was before that.
18 Q. Do you know how much before that it was, are we
19 talking days, weeks?
20 A. I'm going to -- I really don't remember.
21 Q. Obviously Mr. Peterson decided to make this
22 notation on May 16th, 2008. I'm proposing that
23 you had witnessed the storm water pipe removed
24 prior to this date, correct?
25 A. Correct.

22

1 Q. But didn't confront Mike Bernick about this until
2 May 16th, 2008?
3 A. No, I confronted him on the day that he did tear
4 it out.
5 Q. So prior to you confronting him with
6 Randy Peterson on May 16th, 2008, there was
7 another time you confronted Mike Bernick about
8 that?
9 A. Yes. Each time he went through one, I did state
10 that there should be a temporary connection.
11 Q. And do you remember -- And each time you
12 mentioned this concern, this was to Mike Bernick?
13 A. Correct.
14 Q. Did you mention this concern to anybody else at
15 Mission Ridge?
16 A. No, I did not.
17 Q. Did you mention this concern regarding the storm
18 water pipe being removed to anybody at the State
19 of Wisconsin?
20 A. The inspection firm that was out there, I had
21 mentioned it to one of the guys. I don't know
22 who it was. And that's as far as it went.
23 Q. And on each time that you confronted Mike Bernick
24 about this, what was the general gist of your
25 statement to him?

23

1 A. There should be a temporary connection from the
2 catch basin to the storm. I says that's the way
3 we do it with all of our other projects.
4 Q. And that did he say in response to this each time
5 you mentioned this to him? When I say him,
6 meaning Mike Bernick?
7 A. I really don't recall what the exact words
8 were.
9 Q. Let me put it this way. Did he seem to agree
10 with you and say yeah, we'll do something about
11 it, or was it more hey, we'll deal with it and
12 get out of our face kind of thing?
13 A. It was more of a yeah, yeah, yeah. So however
14 he -- you can take that, that --
15 Q. Not acknowledging that he was going to do
16 something, but not telling you to go stick it
17 type thing, just kind of appeasing you and went
18 on his way?
19 A. Kind of appeasing me and going about his way.
20 Q. What about when you approached the inspection
21 firm, and I presume you don't remember the name
22 of the inspection firm and that's fine, right?
23 A. I do not remember.
24 Q. Do you remember that the inspection firm said in
25 response to your concern about the storm water

24

1 A. Could you repeat that?
 2 Q. The storm water lines that were disconnected,
 3 they had no effect on the water lines that were
 4 being related?
 5 A. No, they did not.
 6 Q. Why not?
 7 A. Water main is deeper than the storm.
 8 Q. How much deeper?
 9 A. I would have to say probably five feet. Storm is
 10 closer to the top.
 11 Q. Is there any way that the storm water can get
 12 into the water lines?
 13 A. No.
 14 Q. And is the only reason they can't get in there
 15 because they're five feet apart and they're total
 16 different connections?
 17 A. Total different connections, and it's all
 18 sealed.
 19 Q. So that wasn't a concern you had at all?
 20 A. No.
 21 Q. There's some mention in the daily reports of the
 22 Department of Transportation that Peter Gulbranson
 23 from the City of Oshkosh was trying to shut
 24 down the Henson Bros. contractor because they
 25 had disconnected the storm water line down

33

1 Ohio Street. Do you have any personal knowledge
 2 as to whether or not that was the case?
 3 A. No, I do not.
 4 Q. Do you have any involvement at all with putting
 5 storm water retention ponds?
 6 A. No, I do not.
 7 Q. So being in the water business for the City of
 8 Oshkosh, you don't get involved with the
 9 detention ponds at all?
 10 A. No.
 11 Q. So you don't have any opinion as to whether or
 12 not putting some type of storm water detention
 13 basin along Ohio Street would have prevented this
 14 flooding from happening?
 15 A. No, I do not.
 16 Q. Did you at all see any pumps on Ohio Street on or
 17 about June of 2009?
 18 A. Yes.
 19 Q. And do you know who put those pumps out there?
 20 A. No, I do not.
 21 Q. They weren't put out there at your direction at
 22 all?
 23 A. No.
 24 Q. Do you know how many pumps were out along
 25 Ohio Street?

34

1 A. No, I do not.
 2 Q. Do you think, or do you have any opinion as to
 3 whether or not using pumps on Ohio Street was a
 4 good idea or not, considering the fact that the
 5 storm water pipe was disconnected?
 6 A. I have no idea on storm.
 7 Q. You have no opinion on that area?
 8 A. No.
 9 Q. Did you see the pumps on Ohio Street being used
 10 or functioning on or about June 2009?
 11 A. Yes.
 12 Q. Do you know how many were functioning?
 13 A. No, I do not.
 14 Q. Do you know what direction the water was being
 15 pumped towards; was it down Ohio Street, or was it
 16 it down the side streets?
 17 A. I do not know.
 18 Q. And I'm presuming you don't have any knowledge as
 19 to the size of the storm water pipe that was
 20 removed from Ohio Street or put back on
 21 Ohio Street?
 22 A. No, I do not.
 23 Q. There's some talk in these daily reports from the
 24 Department of Transportation from the engineer of
 25 the DOT on site stating that the city officials

35

1 were on site almost every day inspecting the
 2 project?
 3 MR. (281.50): I'm going to object.
 4 That's a mischaracterization. Go ahead.
 5 MR. ROSENTHAL:
 6 Q. My question to you is this: Do you believe that
 7 you were on site every day during the Ohio Street
 8 construction project? And when I say every day,
 9 I mean every day during the weekdays when you're
 10 working?
 11 A. When they were working on water utility, yes.
 12 Q. So I don't know the duration of the project, but
 13 if I said to you you were on site every single
 14 day during the duration of the Ohio Street
 15 project, would you agree or disagree with me?
 16 A. I would probably have to disagree.
 17 Q. Would you say you were on site 75 percent of the
 18 time, 50 percent? Do you have an idea? I mean,
 19 was it something you had to go there every day
 20 on, or was it more sporadically?
 21 A. It was probably 75 percent of the time.
 22 Q. And it's your understanding that the city is
 23 not responsible for the storm water line on
 24 Ohio Street because that's part of the DOT?
 25 A. That was my understanding, yes.

36

Mark P. Cornelius

1	STATE OF WISCONSIN	1	Said MARK P. CORNELIUS, having been
2	IN THE CIRCUIT COURT FOR WISCONSIN COUNTY	2	first duly sworn by me to testify the truth,
3	SHOWNERS APPRAISALS, LLC-	3	the whole truth, and nothing but the truth
4	REAL ESTATE, LLC- and	4	relative to said cause. In answer to oral
5	MARK W. SHOWNERS.	5	interrogatories, deposed and made answer as
6	Plaintiffs.	6	follows:
7	vs.	7	
8	CITY OF OSHKOSH,	8	[The examination began at p112 a a
9	MUSSON BROS., INC.,	9	on January 5, 2011.]
10	WISCONSIN MUTUAL INSURANCE	10	
11	CORPORATION, and	11	<u>EXAMINATION</u>
12	LEASOR OF WISCONSIN MUNICIPALITIES	12	EXAMINATION BY MR. PASKER:
13	MUTUAL INSURANCE.	13	Q Would you please state your name and spell
14	Defendants.	14	your last name for the record?
15		15	A Mark Cornelius, C-N-E-A-E-L-I-U-S
16		16	Q And would you state your current home
17		17	address, please?
18		18	A 6835 Treblefoot Court, Oshkosh, Wisconsin.
19		19	Q Have you ever had a deposition taken of
20		20	yourself?
21		21	A No.
22		22	Q The reason we always ask that question at
23		23	the outset of every deposition is just to
24		24	kind of give you a general idea of what
25		25	expectations are about a deposition. Is it
26			
27			
28			
29			
30			
31			
32			
33			
34			
35			
36			
37			
38			
39			
40			
41			
42			
43			
44			
45			
46			
47			
48			
49			
50			
51			
52			
53			
54			
55			
56			
57			
58			
59			
60			
61			
62			
63			
64			
65			
66			
67			
68			
69			
70			
71			
72			
73			
74			
75			
76			
77			
78			
79			
80			
81			
82			
83			
84			
85			
86			
87			
88			
89			
90			
91			
92			
93			
94			
95			
96			
97			
98			
99			
100			

920-733-1835 HENES & ASSOCIATE
Serving Northeast Wisconsin

Page 1 of 156

Mark P. Cornelius

1 Q And you were at that meeting?
2 A Yes.
3 Q And who else was at that meeting?
4 A It was -- I believe it was in a weekly
5 progress meeting, on site.
6 Q Okay. And do you remember what his words to
7 you were, basically, not the exact words,
8 but what was the general tone of his words?
9 A Can we do this on a block-by-block basis.
10 Q And what did you say or what did somebody
11 say in response?
12 A I just said if it's constructible, yes, but
13 I didn't believe it was constructible to do
14 it on a block-by-block basis, and I spoke
15 with Ryan in detail as far as the sequence,
16 and Ryan agreed.
17 Q So you and Ryan had a discussion after the
18 fact here?
19 A Yes.
20 Q So you had this weekly meeting and
21 Pete Gulbrenson brought up the fact to you
22 that, hey, can we do this on a
23 block-by-block basis, and you personally
24 said that you're not quite sure if it was
25 constructible that way, right? But you

41

1 would look into it, is that kind of your --
2 A Yes.
3 Q And what was Mr. Gulbrenson's response to
4 that?
5 A I believe Ryan spoke with him about it and
6 Pete understood the reasoning why we
7 couldn't do it on a block-by-block basis.
8 Q And I guess the question to you, sir, is why
9 was it not constructible on a block-by-block
10 basis? What was the reason behind that?
11 A Due to the sanitary sewer and the water main
12 reconstruction, we would have to have the
13 water main in and the sanitary sewer in and
14 shut down construction until those lines
15 were tested, and then come back and put the
16 laterals in, the sewer and water laterals
17 in. Then we would have to put the storm
18 sewer in, and it would be about a two-year
19 project to do it that way.
20 Q Did you inform the City of Oshkosh or the
21 DOT of this fact prior to the letting
22 process?
23 A No.
24 Q Why not?
25 A Because my understanding was that it wasn't

42

1 going to be a block-by-block process. There
2 was no need.
3 Q I'll put some brackets around Exhibit 2
4 here. So if you can read that particular
5 area for the record, and then we'll discuss
6 that if you could, please.
7 MR. DUDAS: He wants you just to read
8 this to yourself. Are you just talking
9 about from here (indicating)?
10 Q Yeah. If you can just read it for the
11 record, it will make it easier. First, sir,
12 can you read that bracketed area for the
13 record, please? And this is from Exhibit
14 Number 2, which is a daily diary report
15 dated April 30, 2008.
16 A "It was agreed upon that the best way to do
17 things is to keep everything caught up in
18 one or two block segments. The storm needs
19 to be caught up so that water can be
20 directed into the new system and off the
21 project."
22 Q My first question to you is, do you believe
23 that the statement here that it was agreed
24 upon about that the best way to do things on
25 a one- or two-block segment basis was agreed

43

1 upon at that meeting on April 23rd, 2008?
2 A No.
3 Q So if Ryan Schanhofer wrote this note, you
4 believe that he wrote it error or
5 misunderstood the conversation?
6 A I believe he misunderstood.
7 Q And this was obviously early on in the
8 project, right? I mean, April 23rd was 23
9 days after the project started, right?
10 A Correct.
11 Q So not a whole lot of the roadway had been
12 removed on Ohio Street at this point in
13 time, correct?
14 A I believe so.
15 Q Do you have an estimate? I mean, we're
16 talking probably 23 days into the project,
17 probably maybe one block or two blocks had
18 been removed?
19 A I want to say it was about two or three
20 blocks, yeah.
21 Q And it's your testimony that it was never
22 agreed upon that Musson Brothers would do
23 this on a block-by-block basis on
24 April 23rd, 2008?
25 A Correct.

44

920-733-1835

HENES & ASSOCIATES

Serving Northeast Wisconsin

800-434-3915

A.App.00097

Mark P. Cornelius

1 understood. I'm not on sure about the City
2 employees.
3 Q But eventually it's your understanding that
4 Ryan came to the understanding that, you
5 know what, you might as well rip up the
6 entire road because if it does rain, even if
7 you had the storm sewer connected, it has no
8 where to go?
9 A Correct.
10 Q Why didn't it have anywhere to go?
11 A Because on the first day of the project, we
12 had to actually plug the storm sewer down by
13 the river to prevent the river from coming
14 into the project via the storm sewer. So
15 from day one we had to plug the storm sewer
16 and begin pumping operations 24 hours. So
17 even if we were to connect that pipe, we
18 would still have a plug there and we would
19 still be pumping. Whether it was connected
20 or not we would be pumping.
21 Q So basically you had to get the water out of
22 the storm sewer in order to remove it,
23 correct?
24 A Correct.
25 Q Because you can't remove a storm sewer with

48

1 water in it, right, or it would be quite
2 difficult?
3 A Yes.
4 Q And you said that basically on the first day
5 of the project you found this out, right?
6 A Yes.
7 Q And you dug down in the dirt and you said --
8 or you pulled out the storm sewer in the
9 dirt and you pulled it out and said, oh, my
10 gosh, there's a lot of water in here. Is
11 that kind of the thought?
12 A Yes.
13 Q And did you have a meeting about this fact
14 with anybody to say, hey, there's water in
15 these storm sewers. What are we going to do?
16 A We anticipated that there would be some
17 water in the storm sewers. We did not, I
18 guess, realize how much water there would be
19 until we dug one up.
20 Q And when you dug one up, there was a lot of
21 water in there?
22 A Yes.
23 Q Would you say they were all the way filled
24 up?
25 A Yeah. We found water in the storm sewer as

50

1 far as, I believe, 7th Street.
2 Q And you would have found the water in the
3 storm sewer all the way up to 7th Street
4 after you removed the 7th Street storm
5 sewer, correct? I mean, you did find it on
6 the first day on the job, right?
7 A Yeah, down by the river, but we just started
8 pumping at that point.
9 Q At what point did you determine there was
10 water all the way down to 7th Street? Was
11 that when you actually physically removed
12 the storm sewer there and you noticed it
13 there also?
14 A Yeah.
15 Q Do you know at what point in time at
16 7th Street the storm sewer was removed?
17 A Mid-summer.
18 Q And when you say you plugged up the existing
19 storm sewer, was that putting a big balloon
20 in the end of the storm sewer? Is that what
21 you did?
22 A We call it a bladder.
23 Q And after the first day on the project when
24 you realized that this was going to be an
25 issue, did you have a meeting with some

51

1 people in your office about this?
2 A I spoke with Mike Ramute on the phone and --
3 Q What did you say to Mike?
4 A -- we then got a bladder and plugged the
5 storm sewer up and set up pumping
6 operations.
7 Q And this bladder that you obtained, is that
8 just something you go to a local hardware
9 store to get or did you have to order it and
10 it took a few days to get there?
11 A No, I believe Mike was able to find one in
12 Green Bay or Milwaukee.
13 Q Is this something you kind of pump up?
14 A Yes.
15 Q And basically it then just engulfs the
16 outlet --
17 A Yes.
18 Q -- on the storm sewer outfall to the river
19 and doesn't allow any water to come back in,
20 correct?
21 A Yes.
22 Q Did you have to go under water to do this or
23 was it above water?
24 A I'm not quite sure how they did it. I
25 believe it was inside of the manhole. I

52

Mark P. Cornelius

1 A When we connected, I believe, up to 8th
2 Street or something like that.
3 Q And was that pump utilized every day?
4 A I believe so.
5 Q At some point the storm sewer system near
6 3rd Street was bulkheaded, correct?
7 A Yeah. I believe we had another -- once we
8 got up to 4th Street, we started pumping at
9 that point too. We had another bladder
10 system set up.
11 Q Where was that located?
12 A I believe that was on 4th Street.
13 Q So you had another bladder system put in at
14 4th Street and Ohio?
15 A Yes.
16 Q Okay. And my prior question was did
17 Musson Brothers do something to bulkhead
18 the existing storm sewer system around
19 3rd Street, and do you know what bulkhead
20 means?
21 A Yes.
22 Q What is it?
23 A Putting a concrete cap inside of a pipe.
24 Q And that was done by Musson Brothers?
25 A I'm not sure.

61

1 Q So you just don't recall whether that was
2 done?
3 A No.
4 Q If I told you I've read in some of the DOT
5 notes that they stated that Musson Brothers
6 was bulkheading the storm sewer system
7 around 3rd Street, you just don't remember
8 or do you disagree with that?
9 A We may have. It would have been under the
10 direction of the DOT, though.
11 Q But if Musson Brothers did bulkhead the
12 storm sewer system near 3rd Street, the pump
13 that was then near the river would only be
14 pumping water from the river to 3rd Street.
15 then, correct? It was in the storm sewer?
16 A I don't recall how the storm sewer ran in
17 the city at that point.
18 Q But you would agree with me that if it did
19 get bulkheaded -- you're saying Musson
20 Brothers preserved the existing storm sewer
21 system by putting a pump near the river,
22 correct?
23 A Yes.
24 Q If it was bulkheaded at 3rd Street, it would
25 only be pumping water from the bulkhead to

62

1 the river, correct?
2 A Possibly, yes.
3 Q What does the word preserve mean to you in
4 the DOT specifications?
5 A Keep it intact.
6 Q What does the word protect mean to you in
7 the DOT standards?
8 A Protect. What other definition is there?
9 Q Well, what does Musson Brothers do on
10 projects typically to preserve, protect, and
11 maintain existing tile drain sewers and
12 other subsurface drains? What does it
13 typically do?
14 A If it gets removed, we replace it.
15 Q And you replace it immediately after you
16 take it out?
17 A It depends on the situation.
18 Q In this instance on Ohio Street, were there
19 times when the storm sewer system was not
20 replaced after the old one was taken out?
21 A Yes.
22 Q So on this particular project on Ohio
23 Street, Musson Brothers was doing something
24 that was contrary than it had done on prior
25 projects?

63

1 HR. DUDAS: Object to the form.
2 A It was done according to plan. We never
3 deviate from the -- the only time we deviate
4 from the plan is when we are directed by the
5 engineer.
6 Q But in this particular instance, you're
7 saying that to preserve, protect, and
8 maintain means to replace the old storm
9 sewer system with a new one, and in this
10 particular instance, maybe according to the
11 plans, but you may not have replaced it
12 right away?
13 A At the engineer's discretion.
14 Q So the engineer -- if the engineer told
15 Musson Brothers that it doesn't need to put
16 back the storm sewer system immediately
17 after taking it out, you listened to the
18 engineer?
19 A Yes.
20 Q And in this particular instance, did the
21 engineer tell you not to replace the
22 existing storm sewer with a new storm sewer
23 immediately after taking it out?
24 A Yes. He agreed that it would not do any
25 good.

64

Mark P. Cornelius

1 A I don't understand when a question is.
2 Q If your testimony that the means and
3 methods -- Strike that. Your testimony is
4 that in order to protect the drainage system
5 and provide temporary drainage on the
6 construction project, you used pumps.
7 correct?
8 A Correct.
9 Q And your testimony is that you moved the
10 pumps on down the project as you went
11 further and further south, correct?
12 A We moved some pumps;
13 Q But there wasn't enough pumps to be at every
14 single manhole?
15 A No.
16 Q So the manholes that didn't have a pump,
17 didn't have the ability to pump the water
18 out that was going down in there, correct?
19 A No.
20 Q And if there was water pooling up in an area
21 where there wasn't a pump, there wasn't a
22 pump to move the water out from there also.
23 correct?
24 A No. We would pump out all of the low areas
25 as necessary, but by that time, we had a lot
81

1 of the storm sewer in.
2 Q But it was still not connected until August
3 of 2008, correct?
4 A When you say "connected," you mean down by
5 the river?
6 Q Correct.
7 A But the storm sewers between 8th and the
8 river were getting connected as necessary
9 and then the water would drain down to the
10 new storm sewer, you know, to the areas
11 where there was a bladder.
12 Q But the bladder would stop it, correct?
13 A And at those points we would pump.
14 Q Where were those pumps?
15 A One was at the river and one was at 4th
16 Street.
17 Q And in June of 2008, there was a major storm
18 in Oakkosh, correct?
19 A Yes.
20 Q A lot of rain, right?
21 A A lot of rain.
22 Q Do you know where those pumps were located
23 on June 12, 2008?
24 A I know we had the one down by the river.
25 I'm not sure if we were up to the one on
82

1 4th Street at that point.
2 Q So you knew you had one by the river, but
3 you don't know where else you had pumps at
4 all?
5 A I think we did have another one at
6 4th Street.
7 Q Any other ones?
8 A I believe we had other ones out there.
9 Q Do you know where they were located?
10 A No, because I wasn't on the project.
11 Q How far down the project was Musson Brothers
12 on June 12, 2008; do you know?
13 A The pavement removal or the utilities?
14 Q Pavement removal.
15 A I believe the pavement removal was removed
16 up to 8th or possibly up to 6th Avenue at
17 that point.
18 MR. DUDAS: Dan, you can continue
19 asking him questions, but when you find a
20 good time to break, can we take a couple?
21 MR. POSANSKI: Yeah.
22 Q So the pavement was removed all the way to
23 9th Avenue right around June of 2008,
24 correct?
25 A Yeah. I don't believe up to 8th. Somewhere
83

1 between 8th and 8th is where we had the
2 pavement removed.
3 Q Do you believe there was sufficient pumps
4 between, say, 8th, if it was really removed
5 to 8th, until the river to remove the water
6 that came down on June 12th, 2008?
7 A Yeah. I believe we did a very good job,
8 considering the amount of water that came
9 down that day.
10 Q Did it pump all the water out that came down
11 that day?
12 A No. I think we had some flooding, but there
13 was no damage. Considering the amount of
14 water, we did a very good job.
15 MR. DUDAS: He's talking about the
16 12th, not the 8th.
17 A Oh, the 12th.
18 Q On June 12, 2008, do you believe that there
19 were sufficient pumps to pump the water that
20 came down on June 12, 2008?
21 A No.
22 Q Do you know the area to the south of
23 9th Avenue going down Ohio Street? Do you
24 kind of know that area near the South Park
25 pond?
84

920-733-1835

HENES & ASSOCIATES

800-434-3915

Serving Northeast Wisconsin

Page 81 to 84 of 15

A.App.00100

Mark P. Cornelius

1	front of my client's property at 4th Street	1	Q	And if you're talking about surface flowage
2	and Ohio, did Musson Brothers notify my	2		of water, that would be another impediment
3	client or any other property owners around	3		from the water flowing down Ohio Street
4	his building that the storm sewers may be	4		toward the river, correct?
5	having problems because of the roadbed being	5	A	Yes.
6	removed?	6	Q	When you went to the Ohio Street
7	A No.	7		reconstruction site prior to the letting
8	Q Did you ever in your practice at Musson	8		process in February of 2008, did you
9	Brothers notify landowners of the fact that	9		determine what the elevation drop was from
10	the roadbed was being removed in front of	10		South Park to the river?
11	their property?	11	A	Didn't you ask me that already?
12	A The DOT engineer, or in this case	12	Q	What's your answer?
13	Ryan Schenbrotter, would have most likely	13	A	No, I did not.
14	notified all the business owners and the	14	Q	Did you know at any point in time that the
15	homeowners on the project as to the sequence	15		difference between South Park and the river
16	of operations.	16		is a 8.1 feet of drop?
17	Q There are storm sewers from the side streets	17	A	No.
18	that go east and west that drain into the	18	Q	Would that have been important to know?
19	Ohio Street storm sewer, correct?	19		MR. DUBAS: Object to form.
20	A I believe so.	20	A	Not in my case.
21	Q And were those rendered inoperable by the	21	Q	Did Musson Brothers know that the Wisconsin
22	disconnection of Ohio Street at any point in	22		Department of Transportation manager
23	time?	23		Tom Buchholz stated, "Weather permitting,
24	A Maybe.	24		the storm system may be disconnected day to
25	Q And were the landowners on the east/west	25		day to complete a portion of the project,

105

107

1	streets along Ohio Street informed of this	1		but must remain in operation." Did he say
2	fact?	2		that?
3	A I'm not sure.	3	A	He may have.
4	Q Were did Musson Brothers think the water	4	Q	Did Musson Brothers continue to pump storm
5	from those cross roads and parking lots	5		and ground water into the sanitary system
6	along Ohio Street, where their water was	6		from the start of the project?
7	going to go if the storm sewer was	7	A	I don't recall pumping into the sanitary
8	disconnected?	8		system.
9	A I wasn't there on a day-to-day basis, but I	9	Q	So if the DOT's notes state that that was
10	would imagine they would be draining into	10		going on, you would disagree with that?
11	the new storm sewer down to where we had the	11		MR. DUBAS: Object to form. Go
12	bladder by the river or 4th Street.	12		ahead.
13	Q And how would that get there?	13	A	No. To my knowledge, we were pumping into
14	A By surface drainage and the new storm sewer.	14		sediment basins.
15	Q So if the new storm sewer wasn't put in	15	Q	Did you know if Musson Brothers knew that
16	there, that would be one impediment from the	16		removing the concrete, road, curb, and
17	side streets, water getting down to the	17		existing piping from underneath the sidewalk
18	bladder, correct?	18		along Ohio Street, it undermined the full
19	A Correct.	19		length of the 66 feet of the road and made a
20	Q Likewise, were there cross streets along	20		path for the water to reach my client's
21	Ohio Street that were still above grade and	21		building? Did you know that?
22	were not removed during this construction	22		MR. DUBAS: Object to form. Go
23	for cross traffic to go through?	23		ahead.
24	A Yes. I believe there were a couple of	24	A	No. I don't believe I was there when that
25	streets that had gravel on them.	25		took place.

108

108

B20-733-1835 HENES & ASSOCIATES
Serving Northeast Wisconsin

800-434-3915

A.App.00101

Mark P. Cornelius

1 Q What else did they do?
2 A That's it. We pumped and we made necessary
3 connections where it was necessary
4 Q And can you tell the record here today what
5 connections you made that were necessary?

MR. DUDAS: Same objection.

6 A I know they did some roof drain connections
7 in certain areas of the project, things like
8 that. Some laterals were re-hooked up.

9 Q But we do know that the storm sewer in front
10 of my client's building on 6th and Ohio was
11 disconnected on June 12, 2008, correct?

12 A Where it was disconnected, I don't know.

13 Q But the storm sewer in front of his building
14 was rendered inoperable, correct, on June 8,
15 2008?

MR. DUDAS: Object to form.

16 A I believe so.

17 Q And as a result of the storm sewer being
18 rendered inoperable in front of his
19 building, water pooled up in front of his
20 building, correct?

MR. DUDAS: Object to form. Go

21 ahead.

22 A No.

113

1 Q No, you don't know that or you don't know
2 whether or not it pooled up?

3 A It pooled up, but it wasn't due to the
4 inoperation of the storm sewer.

5 Q And it's your testimony that it pooled up
6 because it was an act of God, correct?

7 A Yes.

8 Q Now, did you and Musson Brothers plan for an
9 act of God coming on Ohio Street?

10 A No.

11 Q Have you and any other --

MR. CARLSON: Why don't we say nature

instead of God.

12 Q Have Musson Brothers in any other projects
13 you've ever worked on ever planned for an
14 act of nature coming on its construction
15 sites?

MR. DUDAS: Object to the form of the
question; vague. Go ahead and answer it.

16 A When you say "nature," do you mean a normal
17 act of nature.

18 Q Any act of nature, has it ever planned for
19 that?

MR. DUDAS: Object to the form of the
question. Are you talking like a quarter of

114

an inch of rain?

MR. POSANSKI: Any act of nature.

MR. DUDAS: A breeze? Go ahead

4 A Yes.

5 Q What plans has it done?

MR. DUDAS: Objection, vague.

6 A A small storm or a normal storm, yes, we do
7 protect ourselves.

8 Q What do you do to protect yourselves?

9 A We make sure that areas have proper
10 drainage.

11 Q And so it's your testimony that small storms
12 Musson Brothers plans for, correct?

MR. DUDAS: Object to form.

13 A Yes.

14 Q However, Musson Brothers, in your opinion,
15 cannot plan for large storms, correct?

MR. DUDAS: Object to the form of the
question.

16 A We plan for normal storms with excess. In
17 other words, if we feel that this portion is
18 going to -- you know, if we think that we
19 could get a quarter of an inch of rain and
20 we're going to have this amount of water
21 coming through here, we probably double

115

that.

2 Q And does Musson Brothers, when they make
3 that plan, do that at the beginning of the
4 project?

5 A Beginning and throughout.

6 Q So throughout the project, meaning if there
7 is a storm anticipated, it will take actions
8 to fix its system to make sure that the
9 water flows, correct?

10 A Correct.

11 Q Now, in this particular instance on
12 June 12th of 2008, when did Musson Brothers
13 start planning for a storm?

MR. DUDAS: Object to form.

14 A We never planned for that storm.

15 Q So it's Musson Brothers' testimony that if
16 there is a storm that's beyond what you can
17 plan for, there's nothing you can do about
18 it, and the homeowners that surround the
19 construction site must bear the brunt of it?

MR. DUDAS: Object to form.

20 A We will do what we can do to help the
21 situation.

22 Q And in this particular instance regarding
23 the June 12, 2008 storm, and after that

116

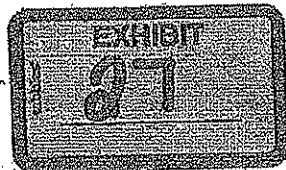
920-733-1835

HENES & ASSOCIATES

800-434-3915

Serving Northeast Wisconsin

A.App.00102



Darren P. Muljo

STATE OF WISCONSIN
IN THE CIRCUIT COURT FOR WINNEBAGO COUNTY

2 SHOWNERS APPRAISALS, LLC,
3 REAL MARKETING LLC, and
4 MARK W. SHOWNERS.

5 Plaintiffs.

Case No. 05-CV-1835

7 CITY OF OSHKOSH,
8 HUSON BROTHERS, INC.,
9 WEST BEND MUTUAL INSURANCE
10 COMPANY, and LEAGUE OF
11 WISCONSIN MUNICIPALITIES
12 MUTUAL INSURANCE.

13 Defendants

14 DEPOSITION OF DARREN P. MULJO

15 Deposition of DARREN P. MULJO, taken
16 before me at Oshkosh, Winnebago County,
17 the City of Appleton, Wisconsin, on the 11th day of January, 2011, A.D.,
18 at Oshkosh, Wisconsin, on the 11th day of January, 2011, in a
19 certain action now pending in Circuit Court,
20 Winnebago County, Wisconsin, wherein the parties
21 thereto are as set forth above.

22 Laura Quiroz,
23 Registered Professional Reporter

24 DEPOSED BY: WILLIAMSON, KELLY & KERTEL,
25 LLC, of Oshkosh, Wisconsin, as parties,
26 JOINTLY, of that firm appeared on behalf of
27 the Plaintiffs.

28 SILENCE SAFFERT CARLSON, S.C., of
29 Appleton, Wisconsin, as RICHARD J. CARLSON,
30 of that firm appeared on behalf of
31 Defendants City of Oshkosh and League of
32 Wisconsin Municipalities Mutual Insurance
33 Company.

34 MARK W. SHOWNERS also appeared

35 INDEX TO EXAMINATION

36 Examination by Mr. Paceski
37 Examination by Mr. Carlson

PAGE
8
76

38 INDEX TO EXHIBITS

PAGE MARKED

39 EXHIBIT NUMBER

40 B - Affidavit of Darren P. Muljo

3

41 INDEX TO REVERSES

PAGE

42 1 Florida notations, notes that
43 requested the name of Huson
44 Brothers' insurance company
45 after the close

14

46 said DARREN P. MULJO, having been
47 first duly sworn by me to testify the truth,
48 the whole truth and nothing but the truth
49 relative to said cause, in answer to oral
50 interrogatories, deposed and made answer as
51 follows:

52 (The examination began at 1:00 p.m.
53 on January 5, 2011.)

54 (Exhibit 5 marked for
55 identification.)

56 EXAMINATION

57 EXAMINATION BY MR. PACESEKI:

58 Q. State your name and spell your last name for
59 the record.

60 A. My name is Darren Muljo, H-U-L-J-O.

61 Q. And to this your first time having your
62 deposition taken?

63 A. Actually, this is my second deposition.

64 Q. Let me ask you what type of proceedings that
65 was.

66 A. It was a personal injury.

67 Q. Was you ever at Oshkosh, Wis?

68 A. It was for a third party.

69 Q. Were you a passenger?

70 A. No. It was for a 105 bike down in the City
71 of Brookfield.

72 Q. Is that right you were working for Huson
73 Brothers?

74 A. No. I was working for them at the time.

75 Q. So you've had your deposition taken before.

76 A. And you kind of know the rules, and I had

77 kind of told them out before in your

78 colleague's deposition, but just understood

79 that you have to answer affirmatively with a

80 "Yes" or "No" or explain your response, or

81 none adding, and no "uh-huh," okay?

82 A. Okay.

83 Q. And if you need to take a break, let me
84 know, all right?

85 A. All right.

86 Q. And your current home address?

87 A. It's 1470 Hudson Road, W-B-D-P-S-E-N, is

88 within Wisconsin and within is O-M-I-N-A

89 And your current employer?

90 A. Huson.

91 Q. How long have you been with Huson?

92 A. It's been four and a half years.

93 Q. And prior to working for Huson, who did you

920-733-1835

HENES & ASSOCIATES

A.App.00103

Darren P. Mulje

1 or exceed the regulatory requirements
2 regarding the June 12, 2008 flood?
3 MR. DUDAS: Objection, foundation.
4 A I'm not a hydraulic engineer.
5 MR. DUDAS: And it's been asked and
6 answered.
7 Q So you would ask for a hydraulic engineer to
8 make that decision or some type of an
9 engineer who could calculate that?
10 A If you want to get into specifics, sure.
11 Q And did you, to your knowledge, have an
12 engineer review the existing pumps on Ohio
13 Street to determine whether or not they had
14 the capabilities to pump water to the level
15 that happened prior to June 12, 2008?
16 A We were working under the direction of an
17 engineer named Ryan Schänhofer, that if he
18 had any problems with our pumping method or
19 their capabilities, he would have addressed
20 it with us.
21 Q Did Hussion Brothers personally take any
22 action within its company with any third
23 parties to determine whether or not its
24 pumps had the capabilities to handle the
25 storm to the level it happened on June 12,

49

1 2008?
2 MR. DUDAS: Objection, asked and
3 answered. Go ahead.
4 A No, we did not. We relied on the expertise
5 of the PDI engineer who accepted our plan.
6 Q So you gave him a plan indicating what you
7 wanted to do for the pumps, correct?
8 A I believe the plan was a compilation from
9 the City of Oshkosh and Ryan that was handed
10 down to Hussion, which Hussion had no part in.
11 I believe, writing up, which you showed here
12 to Mark previously.
13 Q So Hussion Brothers, to my knowledge,
14 according to Mr. Cornelius' testimony,
15 brought six pumps, approximately, to the
16 site at the beginning of the construction,
17 correct?
18 A That's what I understand.
19 Q Did you have involvement with that at all?
20 A No, I did not.
21 Q So then Hussion, at some point after the
22 initial construction, brought three more
23 pumps, right?
24 A That's my understanding.
25 Q And the initial six pumps that were put on

50

1 the project, do you have any understanding
2 or personal knowledge as to who made the
3 decision to put the six pumps there?
4 A I believe it may have rested with
5 Mike Ramuta.
6 Q And Mike Ramuta is a Hussion Brothers --
7 A A past foreman for Hussion Brothers, correct.
8 Q Do you have any kind of knowledge as to what
9 would have happened if the pumps were not
10 there and not working on June 12th of 2008?
11 A Well, flooding still would have existed.
12 With all the pumping that we did, flooding
13 still occurred. The amount of rainwater
14 that fell over the course of hours is
15 something the region had not seen in a
16 decade.
17 Q Would water sit like it did if the pumps
18 were working?
19 A I guess I would say that there was no place
20 for the water to be pumped. Where were you
21 going to pump it, back out of the grade into
22 a manhole that's filled with water
23 Q Well, hearing your testimony, I'm hearing
24 that you're saying that really nothing could
25 have been done to prevent this, right?

51

1 A It was an act of nature, a 75-year storm.
2 Q So Hussion Brothers knew in advance if a
3 75-year flood happened that there was
4 nothing it could do to protect the
5 neighboring landowners, correct?
6 MR. DUDAS: Object to the form of the
7 question.
8 Q Did it know? Did it think about if we had a
9 75-year flood what are we going to do about
10 this?
11 A I don't believe that's something that any
12 contractor would anticipate.
13 Q So Hussion Brothers didn't think about it?
14 A Hussion met and exceeded the existing
15 capacity of the storm sewer system, which
16 would have been overrun by that 75-year
17 storm whether we were there or the road was
18 under construction or not.
19 Q Did Hussion Brothers consider whether or not
20 its plan could help a 75-year flood?
21 A I don't believe they knew a 75-year flood
22 was coming, and I don't believe we would
23 have been able to plan for it.
24 Q Did Hussion Brothers determine what could
25 have been done for a 50-year storm?

52

920-733-1835 HENES & ASSOCIATES
Serving Northeast Wisconsin

800-434-3915

A.App.00104

Thomas J. Buchholz

STATE OF WISCONSIN IN THE CIRCUIT COURT FOR WINNEBAGO COUNTY			
1	SHOWERS APPRAISALS, LLC, REAL MARKETING, LLC, and MARK W. SHOWERS,	1	Said THOMAS J. BUCHHOLZ, having been
2	Plaintiffs,	2	first duly sworn by me to testify the truth
3		3	the whole truth, and nothing but the truth
4		4	relative to said cause, in answer to oral
5		5	interrogatories, deposed and made answer as
6		6	follows:
7		7	
8		8	(The examination began at 12:09 p.m.
9		9	on January 12, 2011.)
10		10	
11		11	<u>EXAMINATION</u>
12		12	BY MR. POSANSKI:
13		13	Q State your name and spell your last name for
14		14	the record, please.
15		15	A Thomas John Buchholz, B U C H H O L Z
16		16	Q And what is your current home address.
17		17	please?
18		18	A Current home address is 1605 Orchard Lane,
19		19	Little Chute, Wisconsin
20		20	Q And are you currently employed?
21		21	A Yes.
22		22	Q By whom?
23		23	A Wisconsin Department of Transportation
24		24	Q And have you ever had a deposition taken of
25		25	yourself before?
		3	
<u>APPEARANCES</u>			
1	DEWESEY, WILLIAMSON, KELLY & HERTEL,	1	A Yes
2	LLP, of Oshkosh, Wisconsin;	2	Q And how many times has that happened?
3	MR. DANIEL J. POSANSKI of that firm appeared	3	A Once
4	on behalf of the Plaintiffs	4	Q And you know what type of matter that was?
5	BILTON, SEIFERT & CARLSON, S.C., of	5	A Yes
6	Appleton, Wisconsin; MR. RICHARD J. CARLSON	6	Q Could you explain that, please, just
7	of that firm appeared on behalf of the	7	generally?
8	Defendants City of Oshkosh and League of	8	A It was a not real estate acquisition matter
9	Wisconsin Municipalities Mutual Insurance	9	Q Eminent domain or condemnation issue?
10	McCanna, Dudas & Kenley, S.C., of	10	A Yeah, right to take, I guess, is probably
11	Appleton, Wisconsin; MR. DAVID G. DUDAS of	11	the right term
12	that firm appeared on behalf of the	12	Q When you had your deposition taken, probably
13	Defendant Kusion Bros, Inc.	13	the attorney read you some rules, kind of
14		14	stating to you you need to answer in
15		15	affirmative responses, no head nods or
16		16	uh-huns or you remember that?
17		17	A Yes
18		18	Q If you need clarification on any of my
19		19	questions, please let me know and I'll
20		20	rephrase them, if necessary
21		21	A Yes.
22		22	Q And we can take breaks, if necessary
23		23	A Yes
24		24	Q First off, you did receive a subpoena to
25		25	come to Mr. Carlson's office today, correct?
<u>INDEX TO EXAMINATION</u>			
1	Examination by Mr. Posanski	PAGE	3
2	Examination by Mr. Carlson	89	
3	Examination by Mr. Dudas	92	
4	Further examination by Mr. Posanski	112	
5	Further examination by Mr. Dudas	118	
<u>INDEX TO EXHIBITS</u>			
1	BUCHHOLZ EXHIBIT NUMBER	PAGE MARKED	
2	Letter, 8/1/07, to Mr. Patek from	42	
3	Mr. Buchholz with attached documents	26	
4	Standard Specifications for Highway	50	
5	and Structure Construction	78	
6	As-built plans	82	
7	Pre-Construction Conference Agenda	82	
8	Public Information Meeting documentation	82	
9	Schedule		

920-733-1835

Serving Northeast Wisconsin

HE

EXHIBIT

DP22

800-434-3915

Page 1 to 4 of 122

A.App.00105

1 Q Did they ask you or inform you to take that	1 Q Turning your attention to the second page,
2 into consideration when developing the Ohio	2 205.3.3, do you see that?
3 Street reconstruction project?	3 A Yes.
4 A No.	4 Q Do you see that section, Mr. Buchholz?
5 Q Would that be something you considered	5 A Yes.
6 during the construction project?	6 Q What is the section titled?
7 A No.	7 A Drainage During Construction.
8 Q And that would typically be something placed	8 Q And are you familiar with that provision?
9 upon the contractor; correct?	8 A Yes.
10 MR. DUDAS: Object to form.	10 Q And that provision speaks of the duties that
11 A Could you clarify that question?	11 the contractor must follow when considering
12 MR. POSANSKI: Read the question	12 drainage during construction?
13 back.	13 A Yes.
14 (Requested portion read by reporter.)	14 Q What duties does the contractor have during
15 MR. DUDAS: Same objection.	15 the construction process?
16 A I still don't understand.	16 A To maintain drainages to the best of their
17 MR. POSANSKI: Read the question	17 abilities.
18 again.	18 Q And is it your understanding that the
19 (Requested portion read by reporter.)	19 contractor is responsible to maintain
20 A (Continued) How we do it? We design storm	20 drainage at all times during the
21 sewers to a standard, 10-year storm, check	21 construction project?
22 25-year storm. So that is what you design	22 A Yes.
23 for, unless you're directed to do something	23 Q Is it your understanding that it is solely
24 else, which isn't the standard practice.	24 the duty of the contractor to maintain
25 Q And they never asked you to do something	25 drainage?
26	27
1 above and beyond the standard; correct?	1 A Yes.
2 A Yes.	2 Q What does it mean to you under the section
3 Q It's your understanding, during the Ohio	3 where it says the contractor must preserve,
4 Street reconstruction project, that the	4 protect, and maintain? What does that mean
5 contractor for the project was Musson Bros.?	5 to you?
6 Is that your understanding?	6 A Exactly what it says, preserve, protect, and
7 A Yes.	7 maintain.
8 Q And Musson Bros., Inc., is required to	8 Q What does the word preserve mean? What do
9 follow the standard specifications for	9 you understand that to mean as a DOT
10 highway construction; right?	10 official?
11 A They're required to follow the standard	11 A As a DOT official, it would mean to not go
12 specifications.	12 negligently ripping up facilities that
13 Q And you're familiar with those?	13 weren't going to be worked on. So, for
14 A Yes.	14 example, if we're going to put in storm
15 MR. POSANSKI: Mark this.	15 sewer from A to B, they don't rip out from C
16 (Buchholz Exhibit 2 marked.)	16 to D when they're working on A to B.
17 Q Mr. Buchholz, I'm showing to you now what	17 Q So, for example, if Ohio Street is being
18 has been marked as Exhibit No. 2. First	18 reconstructed from 9th Avenue all the way to
19 off, do you recognize the cover page on that	19 Witzel -- you know that area; right?
20 document?	20 A Yes.
21 A Yes.	21 Q -- that would mean to you that the
22 Q And what is it?	22 contractor would not take out the whole
23 A It's the 2011 edition of the Wisconsin	23 entire storm sewer system from 9th Avenue to
24 Standard Specifications for Highway and	24 Witzel at one time?
25 Structure Construction.	25 A Correct.
26	28

Thomas J. Buchholz

1 Q Would it sit there for 24 hours?	1 appears to be the plans for the bridge on
2 A No.	2 the Ohio Street reconstruction project;
3 Q It would typically flow down the street, go	3 correct?
4 into the storm sewer; correct?	4 A No, it represents the south approach to the
5 A Yes.	5 Wisconsin Street Bridge.
6 Q Do you understand the concept of hydrostatic	6 Q I apologize. Within this packet, though,
7 pressure? Do you have expertise in that	7 there are some more plans. If we could turn
8 area?	8 to Page -- it basically doesn't have a page
9 A No.	9 number, but a State project number of
10 Q The idea of whether or not water would stand	10 6110-16-71. Are those a separate set of
11 in front of a building for 24 hours, you	11 plans within this packet?
12 don't have any idea whether or not	12 A Yes.
13 hydrostatic pressure would cause the water	13 Q What area is this?
14 pressure to rupture buildings along the	14 A For the reconstruction of Ohio Street from
15 roadway?	15 South Park to Witzel.
16 A No.	16 Q That's what we've been talking about today?
17 Q You're familiar with the Main Street	17 A Yes.
18 reconstruction project in the City of	18 Q These plans were designed by who?
19 Oshkosh?	19 A URS Corporation.
20 A I heard of it, yes.	20 Q They were accepted by the City of Oshkosh;
21 Q Were you involved with that one?	21 correct?
22 A No.	22 A Yes.
23 Q Do you have personal knowledge as to whether	23 Q And why does the City of Oshkosh accept
24 or not this was done block by block or whole	24 these plans, do you know?
25 stretches at a time?	25 A Because this is a connecting highway and
49	51
1 A I don't know where the sanitary sewer laid,	1 they become the ultimate maintaining
2 in terms of relationship to the storm sewer,	2 authority of this, so they have to accept
3 as it relates to what happened on Ohio	3 them because they're going to accept
4 Street.	4 maintenance of it.
5 Q Fair enough. Basically I'm asking you what	5 Q Also at the bottom of this document there is
6 happened. You don't know?	6 a signature. It looks like -- is that your
7 A No.	7 signature at the bottom right-hand corner?
8 Q I show to you what has been marked	8 A Yes.
9 previously as Exhibit No. 23. Do you	9 Q You signed that on 7/30 of 2007; correct?
10 recognize that document?	10 A Correct.
11 A Yes.	11 Q Towards the top of that page there's
12 Q What is it?	12 something that says as-built plan. Do you
13 A This is the south approach to the Wisconsin	13 see that?
14 Street Bridge project.	14 A Yes.
15 Q And then I'll represent to you,	15 Q What does as-built plan mean for the record?
16 Mr. Buchholz, this was previously marked as	16 A As-built means the project leader in the
17 Exhibit No. 23 in a different deposition	17 field will make note of any changes that
18 that we had.	18 occurred in construction. Typically that
19 MR. POSANSKI: Maybe, for purposes of	19 could mean an inlet that moved, a manhole
20 this deposition -- actually let's mark it as	20 that moved, something that ultimately the
21 another one, if we could, please.	21 maintaining authority would want a record of
22 (Buchholz Exhibit 3 marked.)	22 what changes occurred.
23 Q (Continued) Showing to you what has now	23 Q And it appears as though there's three names
24 been marked as Exhibit No. 3, you had	24 on here for people or entities that were
25 represented before that this first page	25 involved in the as-built plans; correct?
50	52

920-733-1835

HENES & ASSOCIATES

800-434-3915

Serving Northeast Wisconsin

A.App.00107



STATE OF WISCONSIN

CIRCUIT COURT

WINNEBAGO COUNTY

SHOWERS APPRAISALS, LLC,

Case No.: 09-CV-1438

REAL MARKETING, LLC, and

Case Code: 30301

MARK W. SHOWERS,

Plaintiffs,

-vs-

CITY OF OSHKOSH,

MUSSON BROS., INC.,

WEST BEND MUTUAL INSURANCE
COMPANY, and

LEAGUE OF WISCONSIN MUNICIPALITIES
MUTUAL INSURANCE,

Defendants.

AFFIDAVIT OF MARK W. SHOWERS

STATE OF WISCONSIN)

) ss.

WINNEBAGO COUNTY)

MARK W. SHOWERS, being first duly sworn on oath, deposes and states under penalty of perjury pursuant to the laws of the State of Wisconsin that the foregoing is true and correct.

1. I make this Affidavit in Opposition to Defendants' Motion for Summary Judgment, being duly authorized.

2. I am competent to testify to the facts contained herein, the same being based on my personal knowledge.

07099363 vrb 1

A.App.00108

3. I personally own the land and building located at 601 W. 6th Avenue, Oshkosh, Wisconsin 54902. This building is the location of Real Marketing, LLC and Showers Appraisals, LLC. I am the majority owner of Real Marketing, LLC and Shower Appraisals, LLC.

4. I am a real estate appraiser by trade and am a licensed by the state of Wisconsin.

5. In June 2007, I purchased the 601 W. 6th Avenue property. The property had a residence located thereon. The existing 120 year old building was razed in 2007 to make room for totally new constructed commercial building for my businesses.

6. The construction of my new building was completed and occupancy was taken on or about December 15, 2007.

7. During the construction of the new building, the City of Oshkosh ("City"), according to its Codes, required that my sump pump and all down spouts be connected to the Ohio Street storm sewer. In addition, the City required that I construct a storm sewer inlet in my parking lot which also connected to the Ohio Street storm sewer. The cost to install the parking lot storm sewer inlet was approximately \$5,000.00.

8. I was reluctant to add the storm sewer inlet for my parking lot due to the additional costs I would have to incur. The City informed me that I was required by the City Code and that it had no authority to deviate from these requirements.

9. That, as part of the Ohio Street reconstruction project in the summer of 2008, excavation of the existing Ohio Street roadbed below the original grade took place on the street immediately outside of my building located at 601 W. 6th Avenue. I personally observed that the entire roadbed from Witzel Street to South Park Avenue, which is approximately .66 miles, had been removed 1.5 to 2 feet below the original grade. I have attached hereto as Exhibit "A" a photo depicting that the grade of the road was below the level of the sidewalk.

10. Sometime in or around June 2008, during the Ohio Street reconstruction project, two rain events occurred in the City of Oshkosh producing heavy rainfall.

11. I personally observed both rain storm events that occurred on June 8, 2008 and June 12, 2008.

12. That, immediately after the first rain storm event on June 8, 2008, I personally observed that the excavated portion of the street outside my building was holding standing water.

The End

13. I spoke with a City employee and with a Musson Bros., Inc. ("Musson") employee regarding the large amounts of standing water in front on my building after the June 8, 2008 storm, and before the June 12, 2008 storm. I asked the City employee and the Musson employee if anyone was going to do anything to prevent this "bath tub" effect from happening again, since another potentially large storm was anticipated. They both told me that there was nothing they could do since they did not know why this was occurring.

14. That, within days after the first storm, I personally observed a second rain storm event and personally inspected the water on Ohio Street outside my building.

15. During the June 12, 2008 storm, I recall walking outside of my building.

16. After the storm, on June 13, 2008, I observed the storm water not draining due to the "bath tub" effect created by the excavation of the street. The water did not flow to the north toward the Fox River since 6th Avenue at Ohio Street remained open to traffic during the construction and the road elevation was much higher than the excavated road bed. I have attached hereto as Exhibit "B" a photo depicting that "bath tub" effect of the storm water in front on my building.

17. I personally observed that the storm sewer inlets and box culverts were covered with screening material which were filled with mud and dirt. I have attached hereto as Exhibits "C1, C2, C3, C4, C5" photos depicting what the storm sewer inlets and box culverts looked like. It was clear to me that the water could not drain through this material.

18. I personally observed that the manholes were above the water level and water could not enter the storm sewer system. I have attached hereto as Exhibit "B" photos depicting what the manholes looked like. It was clear to me that the water could not drain through the manholes.

19. I personally observed seven foot four inches (7'4") of water in the basement of my building after the June 12, 2008 storm. I have attached hereto as Exhibit "F" a photo depicting what the water looked like in my basement on the morning of June 13, 2008.

20. When I returned to my building on June 13, 2008, I did not observe any pumps in front of my building or anywhere down Ohio Street, except one pump to the south on Ohio Street near the corner of 7th Avenue and Ohio Street; however, that pump was not running.

21. The water continued to fill the excavated roadbed in front of my building for approximately 15-18 hours after the June 12, 2008 storm; the water simply had no place to go. The water began to slowly recede thereafter.

22. I have been told, by an expert engineer, that if the road was intact during the June 12, 2008 storm, the road itself would have held the weight of the water and there would not have been hydrostatic pressure sufficient to rupture my basement floor. I have attached hereto as Exhibits "E1, E2" a photo depicting what the rupture in my basement floor after the June 12, 2008 event.

23. During the Ohio Street construction project, and on June 12, 2008 and June 13, 2008, I personally observed large mounds of what appeared to be excavated soil sitting on Ohio Street. I have attached hereto as Exhibit "D" a photo depicting what the mounds of dirt looked like. It was clear to me that these mounds prevented any water from draining down Ohio Street.

24. The sump pump in my basement ran continuously after the storm. My father and I contacted the City to ask them why my sump pump was running as it was. City officials visited my building. I had no idea, at this time, that the Ohio Street storm sewer had been disconnected, nor did the City officials inform me of this fact. Knowing now that Ohio Street was disconnected, it makes sense to me now that my sump pump was recycling water that had nowhere to go since the Ohio Street storm sewer was not functioning. I was required to run fans in my basement since mold was forming, since the water had no place to go.

25. For over 6 months, in front of my building, Musson removed the road, created a large ditch, and, I know now, they had abandoned the storm sewer. I would have expected the City Officials and Musson to have informed me that the storm sewer in front on my building was disconnected. Particularly, since my sump pump, down spouts and storm sewer inlet rely 100% upon the Ohio Street storm sewer as its lifeline to drain the water from my building.

26. The flooding damaged my supplies, equipment, inventory, improvements, and forced me to move my business to another location for four months until everything could be cleaned up, repaired and restored. The total cost for me to construct my new building in 2007 was approximately \$265,000.00. As a result of Musson and the City's negligence, I estimate that the total damage to my businesses and property is approximately \$140,000, not including my attorney's fees and costs pursuing this litigation. If I was notified that the storm sewer in front on my building was disconnected, I would have taken action to remove items from my basement, which would have taken about an hour and would have saved me approximately \$70,000.00 in damages.

27. I did not receive any insurance money or disaster aid to cover any of the damages that my businesses and building sustained.

28. My building is located at ground level. I had no water intrusion into the main level of my building. All of the 7'4" of water entered from my ruptured basement floor. I am not aware of any other businesses or residential properties in the City of Oshkosh that sustained a ruptured basement floor similar to mine.

Mark W. Showers

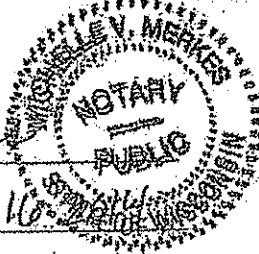
Mark W. Showers

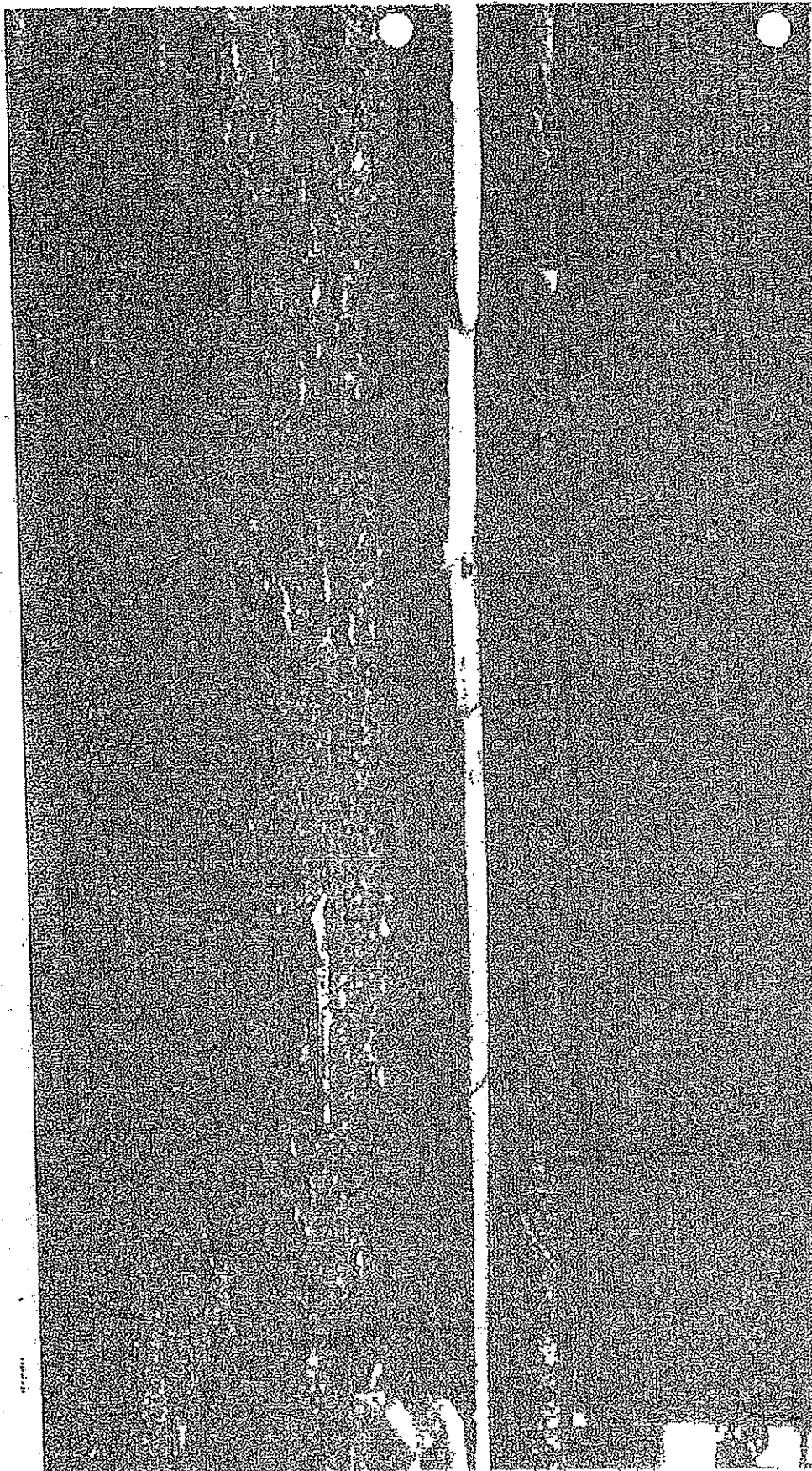
Subscribed and sworn to before me
this 14th day of February, 2011.

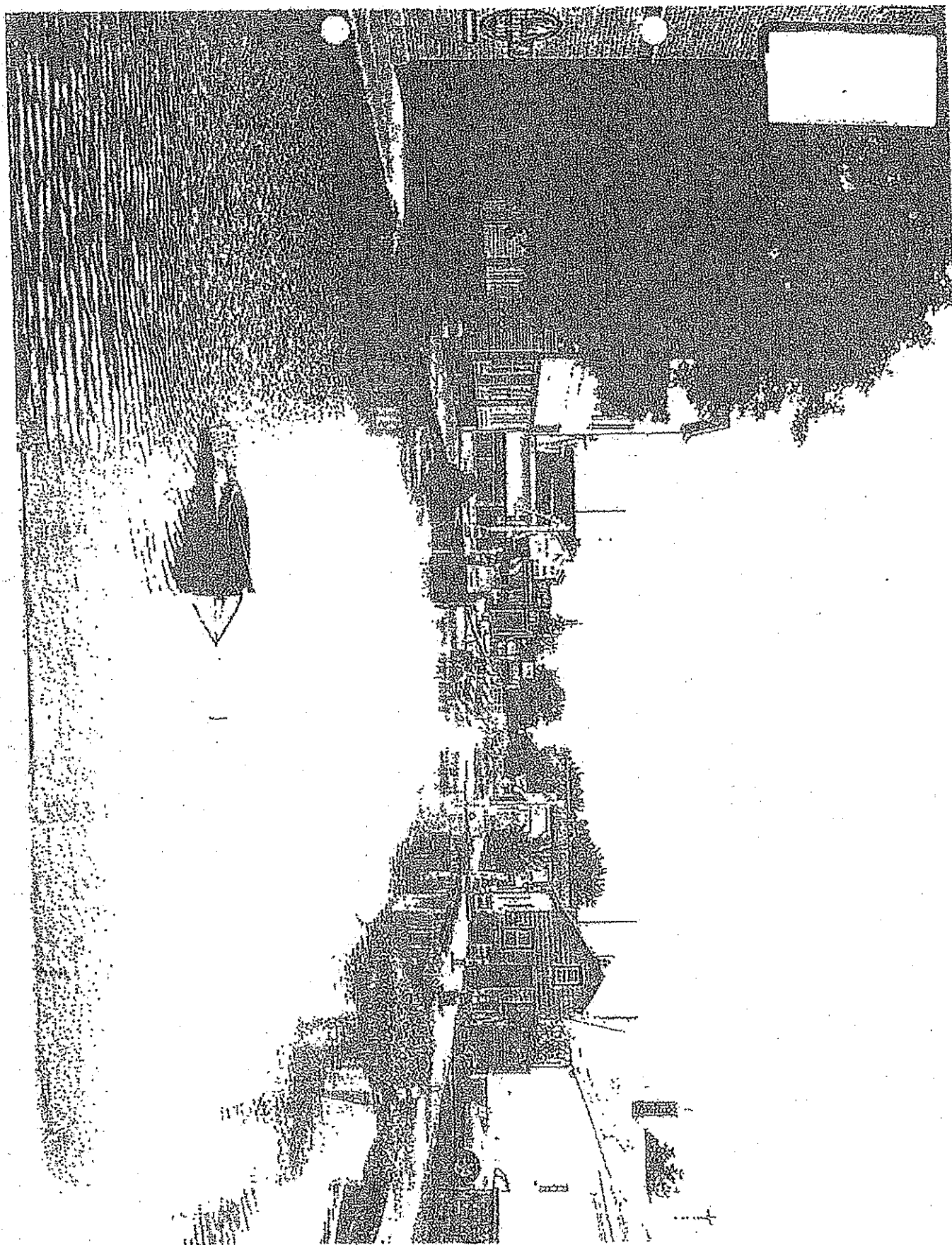
Michelle V. Merkes

Notary Public, State of Wisconsin

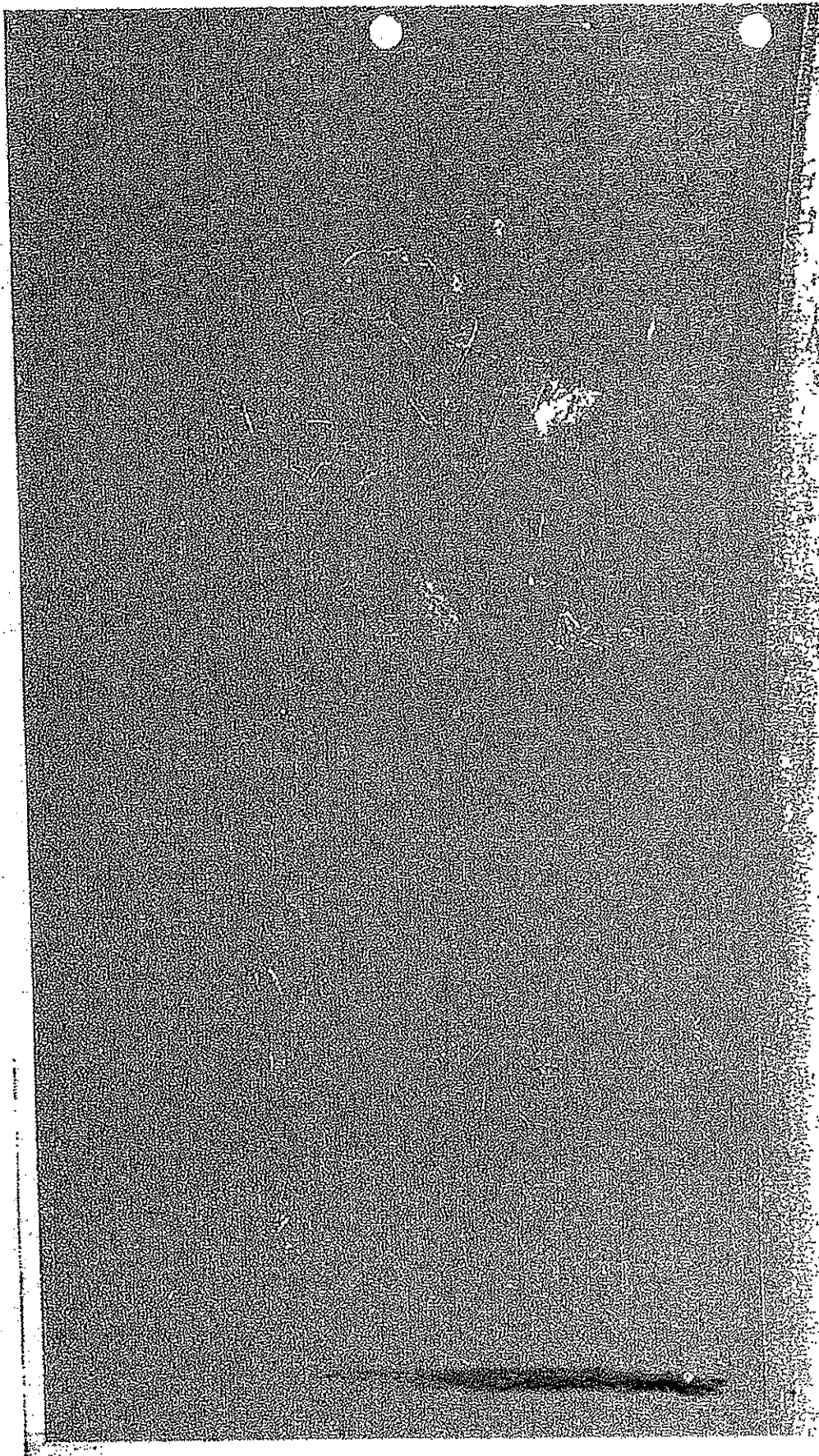
My Commission expires on 11-16-2014





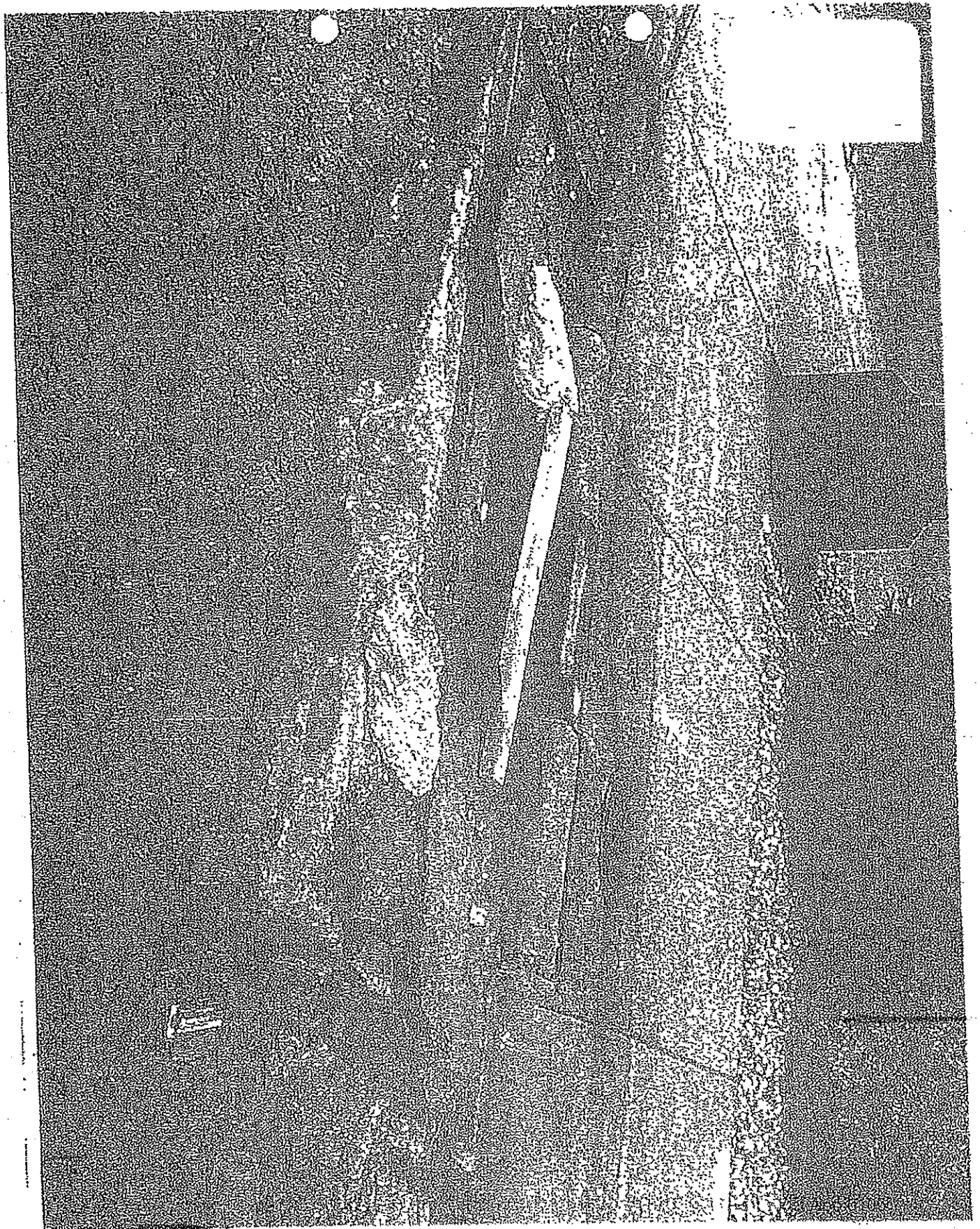


A.App.00114





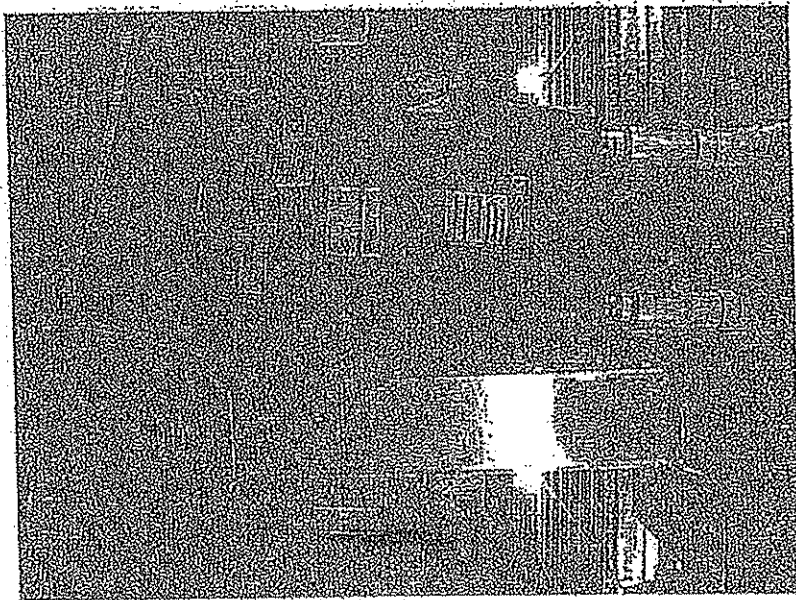
A.App.00116



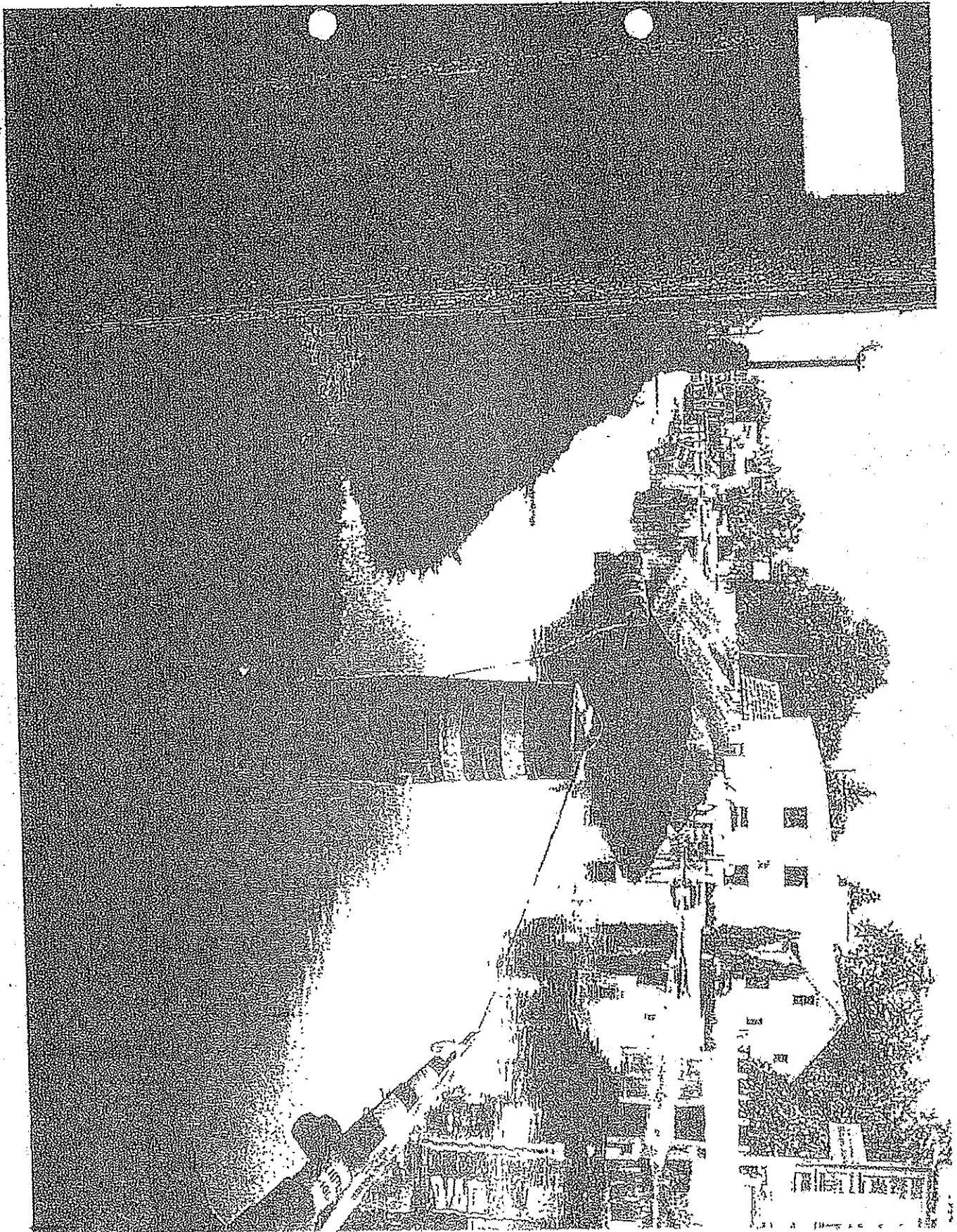


A.App.00118

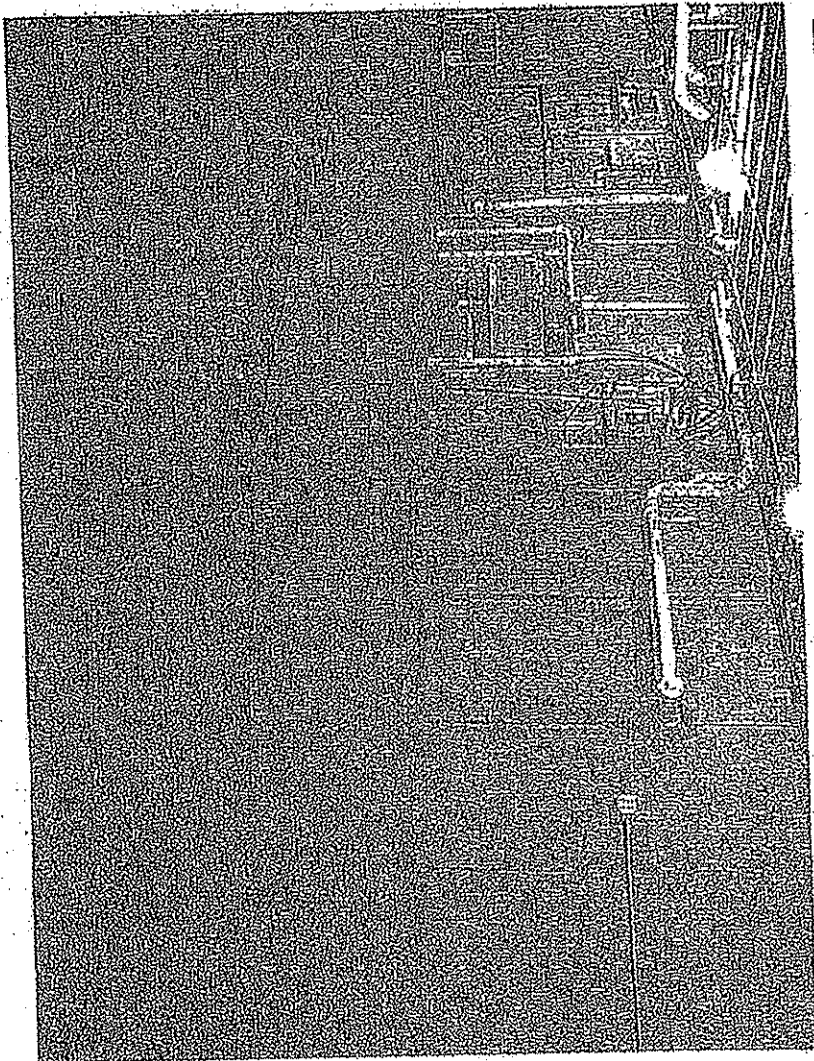
601 W 6th Avenue, Oshkosh, WI



Furnace after catastrophe happened.

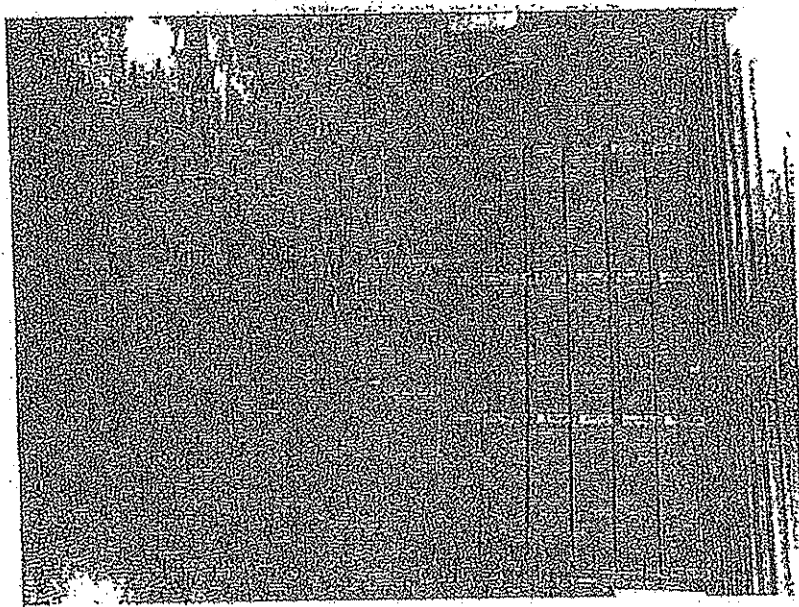


601 W 6th Avenue, Oshkosh, WI



Floor rupture where water came in.

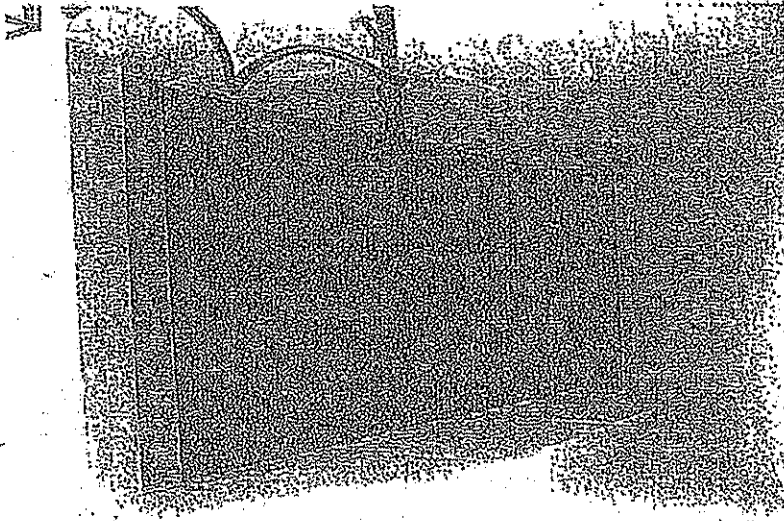
601 W 6th Avenue, Oshkosh, WI



Floor rupture where water came in.

601 W 6th Avenue, Oshkosh, WI

6/13/2008 8:33 AM



Looking down stairwell. Total water height in basement
seven foot four inches (7'4") of water.



STATE OF WISCONSIN

CIRCUIT COURT

WINNEBAGO COUNTY

SHOWERS APPRAISALS, LLC,

REAL MARKETING, LLC, and

MARK W. SHOWERS,

Case No.: 09-CV-1438

Case Code: 30301

Plaintiffs,

-vs-

CITY OF OSHKOSH,

MUSSON BROS., INC.,

WEST BEND MUTUAL INSURANCE
COMPANY, and

LEAGUE OF WISCONSIN MUNICIPALITIES
MUTUAL INSURANCE,

Defendants.

AFFIDAVIT OF STEVEN E. KAISER, P.E.

STATE OF WISCONSIN)

OUTAGAMIE COUNTY)

ss.

STEVEN E. KAISER, being first duly sworn on oath, deposes and states under penalty of perjury pursuant to the laws of the State of Wisconsin that the foregoing is true and correct:

1. I am a licensed professional civil and structural engineer and an employee of Larson Engineering, Inc. located in Appleton, Wisconsin. Larson Engineering, Inc. has offices in six other states.

2. I have over 25 years of engineering experience. My expert experience includes drainage plan design, water mains, storm sewers, sanitary sewer, and grading plan design, highway design, flood plan analysis and dam inspection and analysis. I have attached my resume as Exhibit "A".

07099411 WPDZ

A.App.00124

3. In June of 2008, I visited the building owned by Mark Showers at 601 W. 6th Street in the City of Oshkosh to investigate the flood damage resulting from the Ohio Street reconstruction project. During my visit I had the opportunity to walk up and down Ohio Street and was able to go into Mr. Showers' building.

4. It is my understanding that the contractor for the Ohio Street reconstruction project was Musson Bros., Inc. ("Musson"). It is further my understanding that the City of Oshkosh ("City") is charged with the responsibility to maintain the storm sewer that is located under Ohio Street.

5. I have reviewed the road and have estimated the size of the depth of the flooding was 18 inches to 24 inches at 6th Avenue and Ohio Street. I further estimated that the area was 44' wide and just under 200 feet in length from the south side of 6th Street to the north side 7th Street. I have determined that there was 15,800 cubic feet, or 117,500 gallons of standing water in the road bed in front of Mr. Showers' property after the June 12, 2008 storm event.

6. In my expert opinion, the damages to the plaintiffs' property was caused by hydrostatic pressure of the water that sat in front of the building for 1.5-1.8 hours after the storm. Hydrostatic pressure would not have been an issue if the Ohio Street road was not removed, as it would have held the weight of the water and would acted as a permanent sealant. I base my above opinion knowing the various capacities of storm sewer pipes used under roads, knowing the amount of water in front of Mr. Showers' building, and the slope of 0.1%. With a 18-inch pipe, it would have drained in 1.3 hours. With a 24-inch pipe, it would have drained in 0.6 hours. My review of the storm sewer plans for this project indicates that 24-inch pipe was installed on Ohio Street. Thus, if existing drainage would have been maintained on Ohio Street, the June 12, 2008 storm would have completely drained from Mr. Showers' property within 0.6 hours, and there would have been no rupture of Mr. Showers' basement floor.

7. The hydrostatic pressure was caused by the removal of the road and the failure of Musson to backfill the sidewalk along Mr. Showers' property with a type of fill that would not permit the infiltration of storm water under the building. In my experience, back filling can be accomplished at the time the road is removed and, it appears from view of the photos of Mr. Showers' property, that this was not done.

8. In my experience, engineers, contractors, and municipalities know about the concept of hydrostatic pressure, particularly, when a building is located close to a highway excavation. In this case, Mr. Showers' building is approximately 5 feet from the roadway, and, therefore, extra precautions and planning should have, but were not taken by Musson.

9. I believe the City and Musson did not meet industry standards by their failure to take action to protect Mr Showers' property. I believe the City and Musson failed to notify Mr. Showers' of the fact that the storm sewer abutting his property was not fully functional. In my experience, contractors and municipalities routinely notify businesses and homeowners of potential utility disruptions to their properties. For example, if a water main is being repaired, the property owner will be notified of this disruption.

10. In my experience, storm water planning is created, tested, and implemented long before the project even begins. I understand that a storm water contingency plan was created on the date of the June 12, 2008 event. This leads me to believe that a storm water plan was not even contemplated prior to that date. I believe both Musson and the City did not meet industry standards in waiting until the day of the second large storm event on June 12, 2008, to come up with a plan. Further, I believe the City and Musson failed to calculate the size and power of pumps needed for the size of project that the Ohio Street reconstruction was. Finally, I believe the City and Musson failed in their pumping plan since it was wholly inadequate to deal with anything but a rather trivial storm. In order to maintain existing drainage on Ohio Street in front of Mr. Showers' building, there would have been a need for twenty-one (21) 2 inch submersible 3/4 horsepower (electric) pumps; or eight (8) 3 inch trailer mounted diesel pumps; or nine (9) 4 inch 5 horsepower submersible electric pumps; or five (5) 4 inch 20 horsepower submersible pumps. This would require the same additional pumps at the next block, at which point it would need to be pumped again, and so on until the river is reached.

11. I have reviewed photographs from the day after the June 12, 2008 event, and it is evident that there were piles of materials situated along Ohio Street. I believe Musson did not meet industry standards by leaving these piles of material along the construction site if it was their intention to pump the water along Ohio Street for purposes of drainage since those piles will clearly stop the flow of water.

12. Constructing the project on a block-by-block basis (rather than taking the entire storm sewer up at one time) is the best approach and, in my opinion, should have been the method of construction for this project. I am aware of the Main Street reconstruction project in the City of Oshkosh that occurred in 2010, and am aware of the fact that this project may have been done a block-by-block basis. Musson did not meet industry standards by disconnecting the entire storm water system and not reconstructing the storm water system on a block-by-block basis.

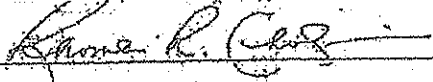
13. I believe the City of Oshkosh engineers had inspectors on site for the Ohio Street reconstruction and that those inspectors must have known that the disconnection of the storm sewer along Ohio Street caused a defect or obstruction in the storm sewer which the City of Oshkosh is charged to maintain and they should have taken action to remedy this defect or obstruction having this knowledge; particularly, knowing his new building relied upon the storm sewer for drainage.

14. In order to reduce potential for flooding during construction, I recommend gravity storm sewer systems be maintained in operating condition.

15. When rain is expected, end-of-the-day activities should include reconnecting of inlets, laterals, and mains; removal of silt from sediment traps in the inlets; and such temporary grading as is necessary to enable the storm sewer system to function. Contractors are usually aware of the forecasts, particularly when their operations may be affected by the weather.


Steven B. Kaiser, P.E.

Subscribed and sworn to before me
this 14 day of February, 2011.



Notary Public, State of Wisconsin
My Commission expires on April 14, 2013

Steven E. Kaiser, P.E.
Civil / Structural Engineer and Project Engineer

Professional History

Mr. Kaiser has over 20 years of experience in consulting engineering. His experience includes structural and civil designs for municipal and private clients, working from planning through construction. Civil projects have included site designs for large commercial and industrial developments involving parking areas and traffic circulation analysis. Steve's structural experience includes reinforced concrete, structural steel, and wood frame construction. Other responsibilities include drainage plan design, water main, storm sewer, sanitary sewer, and grading plan design, highway design, flood plain analysis and dam inspection and analysis.

Steve's design experience has included such projects as:

Menasha Parking Ramp -- Menasha, Wisconsin
Layout of alternatives for proposed downtown parking ramp for planning purposes.

Hortonville Elementary School -- Hortonville, Wisconsin
Design of site grading, drainage, utilities, roadways, and erosion control for new elementary school.

Tri Park Phase 2 -- Appleton, Wisconsin
Design of watermain, storm sewer, sanitary sewer and street grades for second phase of the Tri Park Business Park.

United Behavioral Health -- Menasha, Wisconsin
Prepared plans for grading, utility construction, drainage, and parking for new clinic building.

Phillips Plastics - New Custom Facility -- Phillips, Wisconsin
Prepared design alternative for grading and storm water drainage for new industrial facility, including storm water calculations for DNR review.

Education

Bridge Inspection Training Program with PONTIS Update
Michael Baker Corporation

Bachelor of Science in Civil Engineering
University of Wisconsin -- Platteville

Classes in secondary education program with math major and physics minor
University of Wisconsin -- Oshkosh

Registrations

Registered in Wisconsin

**Professional
Affiliations**

Certified WisDOT Bridge Inspector



STATE OF WISCONSIN

CIRCUIT COURT

WINNEBAGO COUNTY

SHOWERS APPRAISALS, LLC,

REAL MARKETING, LLC, and

MARK W. SHOWERS,

Case No.: 09-CV-1438

Case Code: 30301

Plaintiffs,

-vs-

CITY OF OSHKOSH,

MOSSON BROS., INC.,

WEST BEND MUTUAL INSURANCE
COMPANY, and

LEAGUE OF WISCONSIN MUNICIPALITIES
MUTUAL INSURANCE,

Defendants.

AFFIDAVIT OF KATHY MEISEL

STATE OF WISCONSIN)
) ss.
WINNEBAGO COUNTY)

KATHY MEISEL, being first duly sworn on oath, deposes and states under penalty of perjury pursuant to the laws of the State of Wisconsin that the foregoing is true and correct:

1. I am a resident of the City of Oshkosh and live at 536 W. 6th Avenue. My home is kiddle corner to the property owned by Mark Showers at the corner of 6th Avenue and Ohio Street.

2. I resided at my current address on June 12, 2008, and am familiar with the storm event that occurred on that date.

07099426 WPD-I

3. I recall going outside on the night of the storm event on June 12, 2008, and remember walking up and down Ohio Street. I did not see any pumps on Ohio Street nor did I hear any pumps running.

4. I did see a pump near the corner of 7th and Ohio Street later in the morning on June 13, 2008. I know that the pump was not there the night before, nor was it there early in the morning on June 13, 2008. I believe that pump was moved there later in the morning on June 13, 2008.

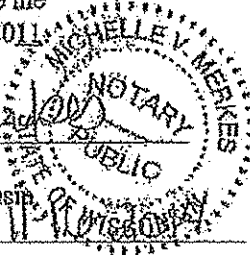
5. I know that the severe flooding that occurred on Ohio Street, and near my property, was fairly localized since my daughter, who lives at 1039 W. 7th Street, did not experience any flooding.

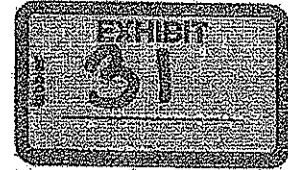
Kathy Meisel
Kathy Meisel

Subscribed and sworn to before me
this 11 day of February, 2011.

Michelle V. Meisel

Notary Public, State of Wisconsin
My Commission expires on 11-19-2011





STATE OF WISCONSIN

CIRCUIT COURT

WINNEBAGO COUNTY

SHOWERS APPRAISALS, LLC,

REAL MARKETING, LLC, and

Case No.: 09-CV-1438

MARK W. SHOWERS,

Case Code: 90301

Plaintiffs,

-vs-

CITY OF OSHKOSH,

MUSSON BROS., INC.,

WEST BEND MUTUAL INSURANCE
COMPANY, and

LEAGUE OF WISCONSIN MUNICIPALITIES
MUTUAL INSURANCE,

Defendants.

AFFIDAVIT OF PATRICIA A. BINNER

STATE OF WISCONSIN

WINNEBAGO COUNTY

ss.

PATRICIA A. BINNER, being first duly sworn on oath, deposes and states under penalty of perjury pursuant to the laws of the State of Wisconsin that the foregoing is true and correct:

1. I am a resident of the City of Oshkosh and live at 562 W. 6th Avenue.
2. I resided at my current address on June 12, 2008, and am familiar with the storm event that occurred on that date.

09160941.WED.1

A.App.00131

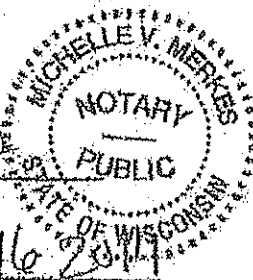
3. I recall going outside on the night of the storm event on June 12, 2008, and remember canoeing up and down Ohio Street. I did not see any pumps on Ohio Street from 5th Avenue to 9th Avenue nor did I hear any pumps running.

4. I did see a pump near the corner of 7th and Ohio Street the next ^{afternoon P.B.} ~~morning~~ on June 13, 2008. I know that the pump was not there the night before. I believe that pump was moved there the next morning on June 13, 2008.

Patricia A. Binner
Patricia A. Binner

Subscribed and sworn to before me
this 19 day of February, 2011.

Michelle V. Merkes



Notary Public, State of Wisconsin
My Commission expires on 11-16-2011



STATE OF WISCONSIN

CIRCUIT COURT

WINNEBAGO COUNTY

SHOWERS APPRAISALS, LLC.

REAL MARKETING, LLC, and

MARK W. SHOWERS,

Case No.: 09-CV-1438

Case Code: 30301

Plaintiffs,

-vs-

CITY OF OSHKOSH,

MUSSON BROS., INC.,

WEST BEND MUTUAL INSURANCE
COMPANY, and

LEAGUE OF WISCONSIN MUNICIPALITIES
MUTUAL INSURANCE,

Defendants.

AFFIDAVIT OF RANDY ERTMER

STATE OF WISCONSIN)
WINNEBAGO COUNTY) ss.

RANDY ERTMER, being first duly sworn on oath, deposes and states under penalty of perjury pursuant to the laws of the State of Wisconsin that the foregoing is true and correct:

1. I am a resident of the City of Oshkosh and I live at 4671 Kristine Street in the City of Oshkosh.


2. I am a real estate agent for Real Marketing, LLC. I am familiar with the storm event that occurred on June 12, 2008. I remember that day, since I left the Real Marketing office located at 601 W. 6th Avenue at approximately 5:30 p.m. I remember going out to my car that was located in the parking lot. I noticed the parking lot's storm sewer over flowing and no water going

07099538 WPD:1

down and Ohio Street being flooded. I was concerned about the possibility of water intrusion in the basement, so I went back inside Real Marketing's building to check. There was not water in the basement at that time.

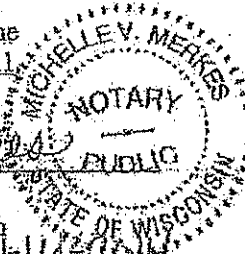
3. When I left the parking lot, I noticed that I would not have been able to go east towards Ohio Street because of the water level.

4. I did not see any pumps located on the corner of 6th Avenue and Ohio Street on June 12, 2008.


Randy Ertner

Subscribed and sworn to before me
this 14th day of February, 2011.





Notary Public, State of Wisconsin
My Commission expires on 11-16-2014

CERTIFICATION FOR APPENDIX

I hereby certify that filed with this Petitioner, either as a separate document or as part of this Petition, is an appendix that complies with Wis. Stat. §§ 809.19(2)(a) and 809.62(2)(f) and that contains:

- (1) a table of contents;
- (2) relevant trial court entries;
- (3) the findings or opinion of the trial court;
- (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning for an understanding of the petition;
- (5) the decision and opinion of the Court of Appeals; and
- (6) any other portions of the record necessary for an understanding of the petition.

I further certify that the electronic copy of this appendix is identical to the paper copy.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve

confidentiality and with appropriate references to the
record.

Dated this 14th Day of December, 2012.

By: S/ Daniel J. Posanski
Daniel J. Posanski
Member No. 1045352

**STATE OF WISCONSIN
SUPREME COURT**

Case No. 2011AP001158

Trial Court Case No. 2009CV1438

RECEIVED

12-26-2012

**CLERK OF SUPREME COURT
OF WISCONSIN**

**SHOWERS APPRAISALS, LLC, REAL MARKETING,
LLC and MARK W. SHOWERS,**

Plaintiffs –Appellants-Petitioners,

v.

**MUSSON BROS., INC. and WEST BEND MUTUAL
INSURANCE COMPANY,**

Defendants-Respondents-Cross-Appellants,

**LEAGUE OF WISCONSIN MUNICIPALITIES
MUTUAL INSURANCE and CITY OF OSHKOSH,**

Defendants-Cross-Respondents.

**APPEAL FROM A JUDGMENT ENTERED ON MAY 2,
2011, IN THE CIRCUIT COURT FOR WINNEBAGO
COUNTY, THE HONORABLE BARBARA KEY,
PRESIDING**

**DEFENDANTS-CROSS-RESPONDENTS LEAGUE OF
WISCONSIN MUNICIPALITIES MUTUAL
INSURANCE and CITY OF OSHKOSH
RESPONSE BRIEF**

BREE A. MADISON, State Bar No. 1065713

RICHARD J. CARLSON, State Bar No. 1013627

SILTON SEIFERT CARLSON, SC
331 E. Washington St.
Appleton WI 54911
(920) 739-2366

TABLE OF CONTENTS

STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	5
A. THE PROJECT	8
B. THE FLOODS	9
ARGUMENT	12
A. IMMUNITY UNDER LYONS SHOULD ATTACH	13
B. THERE IS NO MINISTERIAL DUTY	23
CONCLUSION	30
CERTIFICATION AS TO FORM AND LENGTH	31
CERTIFICATION THAT ELECTRONIC COPY IS IDENTICAL	32
CERTIFICATION OF MAILING	33

TABLE OF AUTHORITIES

WISCONSIN CASES

<i>Allstate Inc. v. Metropolitan Sewerage Commission of Milwaukee County</i> , 80 Wis. 2d 10, 258 N.W. 2d 148 (1977).	25, 26
<i>Barillari v. City of Milwaukee</i> , 194 Wis.2d 247, 533 N.W.2d 759 (1995)	28
<i>Bronfeld v. Pember Companies, Inc.</i> , 2010 WI App 150, 330 Wis.2d 123, 792 N.W.2d 222	21
<i>Cords v. Anderson</i> , 80 Wis.2d 525, 259 N.W.2d 672 (1977)	23, 27, 28
<i>Caraher v. City of Menomonie</i> , 2002 WI App 184, 256 Wis. 2d 605, 649 N.W. 2d 344	25
<i>Estate of Lyons v. CNA Ins. Companies</i> , 207 Wis. 2d 446, 558 N.W. 2d 658 (Ct. App. 1996)	5, <i>passim</i>
<i>Gordon v. Milwaukee County</i> 125 Wis.2d 62, 370 N.W.2d 803, (Ct. App. 1985).	15
<i>Kierstyn v. Racine Unified School Dist.</i> , 228 Wis.2d 81, 596 N.W.2d 417 (1999)	28
<i>Kimps v. Hill</i> , 200 Wis.2d 1, 546 N.W.2d 151 (Wis. 1996)	24, 28
<i>Milwaukee Metropolitan Sewerage Dist. v. City of Milwaukee</i> , 2005 WI 8, 277 Wis.2d 635, 695 N.W.2d 658	26

<i>Welch v. City of Appleton</i> , 2003 WI App 133, ¶ 13, 265 Wis. 2d 688, 698, 666 N.W. 2d 511	26
--	----

FEDERAL CASE

<i>Boyle v. United Technologies Corp.</i> , 487 U.S. 500, 108 S.Ct. 2510	15, 23
---	--------

STATEMENT OF THE CASE

This is a negligence action involving the issue of contractor immunity. The plaintiffs-appellants-petitioners (“Showers”) own property located at 601 W 6th Avenue (at the corner of 6th Avenue and Ohio Street) in Oshkosh (Record 2, Complaint). The property suffered extensive flood damage from a severe storm on June 12, 2008. Id.

The defendant-respondent-cross-appellant Musson Bros., Inc. (“Musson”) is a private contractor. In June, 2008, Musson was reconstructing Ohio Street, part of State Highway 44, under a contract with the Wisconsin Department of Transportation (“WDOT”) (Record 2, Complaint). The contract included reconstruction of the street, the storm sewer, the sanitary sewer and water main pursuant to plans and specifications prepared by WDOT (Record 2, Complaint; Record 33, Gohde Aff., ¶¶ 13-16). WDOT had overall responsibility for supervision and inspection of the project. Id.

The defendant-cross-respondent City of Oshkosh (“City”) assisted in the overall design of the project. The street and storm sewer are under the jurisdiction of WDOT

(Record 57, Supp. Gohde Aff., ¶¶ 2-3). The sanitary sewer and water main are under City jurisdiction. WDOT had sole responsibility for inspecting the street and storm sewer. WDOT and the City had joint responsibility for inspection of the sanitary sewer and water main. Id. The City paid WDOT for project costs associated with the sanitary sewer and water main under a separate contract entitled “State/ Municipal Agreement for Highway Project.” (Record 33, Gohde Aff., ¶ 16.) The City was not a party to the WDOT/ Musson contract, and had no supervisory or management responsibilities for the project.

Under the Musson / WDOT contract, Musson as contractor was “solely responsible for the means, methods, techniques, sequences and procedures of construction.” (Record 33, Gohde Aff., ¶¶ 17-18, Ex. 6, p. 34.) The WDOT contract also provided that Musson must “provide temporary drainage until completing permanent drainage work.” (Record 52, Contract, § 205.3.)

When the June 12 storm hit, the old Ohio Street pavement had been removed by Musson, and Musson had removed or discontinued all, or a significant portion of, the

old stormwater sewer (Record 33, Gohde Aff., ¶¶ 18-19). Musson had in place a temporary drainage system consisting of pumps and hoses. Id. Both the WDOT Project Manager and Project Supervisor testified that Musson fulfilled its contractual duties to provide temporary drainage (Record 56, Carlson Aff., Ex. 3, p. 92, and Ex. 5, pp. 122-123).

The severe storm overwhelmed the City, including the temporary drainage system on Ohio Street. The Showers property, among many others, was damaged. Showers brought negligence actions against Musson and the City (Record 2). The City and Musson brought cross claims against each other (Record 6, 11).

The City and Musson brought motions for summary judgment (Record 32, 34). The City claimed that Ohio Street was under WDOT jurisdiction and that the project along with its supervision was a WDOT responsibility. The City did not remove, disconnect, construct or connect anything, nor did it have the authority to do so, or to tell anyone to do so (Record 31, City/League Brief in Support of Summary Judgment; Record 58, City/League Reply Brief). The City was not negligent. The City also claimed that even if the temporary

drainage system was inadequate or negligent in its design, the City had governmental immunity. Id.

Musson claimed that all the work it performed was done pursuant to the design and specifications provided by WDOT, and under the supervision and inspection of WDOT. Musson claimed that the damage to the Showers property was caused by a natural event, and that in any case, Musson had contractor immunity.

The trial court heard the motions on March 18, 2011. The trial court granted both the City and the Musson motions for summary judgment on immunity grounds (Record 86, Transcript). Judgment was entered on May 2, 2011 (Record 79).

Showers appealed. The Court of Appeals, District II, ordered oral argument. In a decision filed June 27, 2012, the Court of Appeals affirmed the trial court judgment. The Court found that while Musson was afforded some discretion in performing its work, Musson acted pursuant to WDOT specifications, and, that, along with daily WDOT supervision and oversight, entitled Musson to governmental immunity

under *Estate of Lyons v. CNA Ins. Companies*, 207 Wis. 2d 446, 457-458, 558 N.W. 2d 658 (Ct. App. 1996).

STATEMENT OF THE FACTS

A. THE PROJECT

The project consisted of a complete reconstruction of Ohio Street from the Wisconsin Street bridge to 9th Avenue (Record 52, Posanski Aff., Ex. DPI p.10). A total reconstruction includes the replacement of the street, storm sewer, sanitary sewer and water mains. Id. This section of Ohio Street is part of STH 44 and under WDOT jurisdiction. The storm sewer is considered part of the street and under WDOT jurisdiction (Record 57, Supp. Gohde Aff., ¶ 2).

The storm sewer on Ohio Street was originally installed in 1894 (Record 33, Gohde Aff., ¶ 11). It had a design capacity to accommodate no more than a 2 to 5 year rain event.¹ The storm sewer was a “surcharge system.” The outfall in the Fox River was below the water level and river water backed up into the storm sewer. Incoming surface

¹ Steven Gohde, Assistant Public Works Director of Oshkosh originally estimated the capacity as a 10 year storm event (See Record 33, ¶ 13). After some additional study, the capacity was estimated to be a 2 to 5 year storm event (Record 57, ¶ 6).

water drainage would create pressure and move the water through the pipe into the River (Record 37, Cornelius Aff., ¶¶ 17-18).

The project included relocating a new storm sewer to a different location in the right-of-way but utilizing the existing outfall under the Fox River. This required plugging the outfall with an inflatable “bladder” and then pumping out the water in the old storm sewer so that it could be removed (Record 52, Posanski Aff., Ex. DP12, pp. 49-52). The plugging required bypassing the outfall using pumps and hoses. Id. The new relocated storm sewer was designed to accommodate no more than a 10 year rain event (an event likely to occur once every 10 years, or a 10 percent chance of occurring in one year) (Record 33, Gohde Aff., ¶ 20).

The Musson work was done pursuant to a “Contract for Highway Work” between Musson and WDOT dated January 15, 2008, in the amount of \$4,393,833.15 (Record 33, Gohde Aff., Ex. 4). The contract was subject to the “State of Wisconsin Standard Specifications for Highway and Structure Construction” (Record 33, Gohde Aff., Ex. 6). The work was

done pursuant to specific plans and specifications for the project (Record 37, Cornelius Aff., Ex. A and B).

The Project Manager was Thomas Bucholz, a WDOT Professional Engineer. The Project Engineer was Ryan Schanhofer, a Professional Engineer, retained by WDOT. Mr. Schanhofer was responsible for daily supervision of the work (Record 56, Carlson Aff., ¶¶ 4-6).

Section 1.05.5.1 of the WDOT Standard Specifications provided in relevant part as follows (Record 33, Gohde Aff., Ex. 6, p. 34):

Supervise and direct the work competently and efficiently. Devote the attention and apply the expertise necessary to perform the work as the contract specifies. Monitor the work in progress to ensure that the work conforms to the contract. The contractor is solely responsible for the means, methods, techniques, sequences and procedures of construction. The contractor is not responsible for the negligence of others in the design or specification of specific means, methods, techniques, sequences or procedures of construction described in and expressly required by the contract. (Emphasis added.)

Section 205.3.3 of the Standard Specifications provided in relevant part as follows (Record 52, Posanski Aff., Ex. DP4; F):

During construction, maintain roadway, ditches, and channels in a well-drained condition at all times by keeping the excavation areas and embankments sloped

to the approximate section of the ultimate earth grade. Perform blading or leveling operations when placing embankments and during the process of excavation except if the excavation is in ledge rock or areas where leveling is not practical or necessary. If it is necessary in the prosecution of the work to interrupt existing surface drainage, sewers, or under drainage, provide temporary drainage until completing permanent drainage work. (Emphasis added.)

According to Ryan Schanhofer, there are basically three techniques to maintain existing drainage (Record 56, Carlson Aff., Ex. 5, pp. 49-50): bypass pumping; re-laying storm sewer pipe (pulling out old pipe and laying new pipe in progression); and temporary connection of old and new. Id.

The City understood that Musson would be undertaking the project on a block-by-block basis. That is, taking out old pipe and putting in new pipe on a block-by-block basis. On May 16, 2008, a City inspector inspecting sanitary sewer and water mains noticed that the storm sewer sections being installed were not hooked up and that Musson was not proceeding on a block-by-block basis (Record 33, Gohde Aff., ¶ 18, Ex. 7).

The City confronted Musson. The City was told by Musson and WDOT that how Musson was proceeding with the work was the responsibility of Musson under the “means,

methods, techniques, sequences and procedures of construction (Record 33, Gohde Aff., ¶ 18). The City was upset and several heated exchanges took place between Musson and the City.

B. THE FLOODS

Several rains in May resulted in no flooding. On June 8, 2008, Oshkosh was hit by a rainstorm that produced 4.32 inches of rain in 18 hours (Record 33, Gohde Aff., ¶ 4, Ex. 1). The storm was a 25-year event, meaning a storm which is likely to occur only once every 25 years, with a 4 percent chance of occurring in a single year. Id.

Some flooding occurred throughout the City. Showers alleged some flooding at his property on 601 W. 6th Avenue (Record 2, Complaint).

Another large storm was predicted. Musson approached the City for assistance in developing a plan for relocation of pumps for temporary drainage with the idea of pumping some stormwater out of the Ohio Street drainage basin into some of the adjoining basins (Record 33, Gohde

Aff., Ex. 8). The City agreed and developed a storm water contingency plan. The plan had the following notation:

Contractor plans to pump as shown (blue highlight). Some pumps are forcing water to cross drainage basins. In the event the systems being pumped to are flooding, the contractor will switch to pumping within the same drainage basin, additional pumps will be run set up to pump the water along the grade (green highlight). The contractor may be closing additional side streets to allow for hoses and drainage to cross. Id.

In other words, the City allowed Musson to pump water out of the Ohio Street drainage basin into adjoining drainage basins but had to stop if the adjoining basins were flooding. The City had no responsibility in implementing the plan.

On June 12, 2008, Oshkosh was hit by another rainstorm that produced 4.36 inches of rain in six hours (Record 33, Gohde Aff., ¶ 4, Ex. 1). This storm was just under a 75-year event meaning a storm which is likely to occur only once every 75 years, with a 1.33 percent chance of occurring in any single year.

Widespread flooding occurred throughout the City. The City received some 340 complaints or reports by residents about flooding and/or flood damage. Flood damage

occurred in many areas outside the Ohio Street drainage basin (Record 57, Supp. Gohde Aff., ¶ 6).

Flooding occurred as bad or worse on Ohio Street south of 9th Avenue where there was no disconnection of storm sewers (Record 57, Supp. Gohde Aff., ¶ 7). Flood waters from the Stringham Creek drainage basin, adjacent and to the south of the Ohio Street drainage basin, spilled into the Ohio Street drainage basin. Id.

The floods resulted in a FEMA natural disaster declaration. FEMA assistance was made available to the City (Record 57, Supp. Gohde Aff., ¶ 1).

In the opinion of Thomas Bucholz, WDOT Project Manager, Musson complied with the WDOT Standard Specifications for providing drainage during construction (Record 56, Carlson Aff., Ex. 3, p. 92). In the opinion of Ryan Schanhofer, WDOT Project Engineer/Supervisor, Musson complied with Section 205.3.3, providing drainage during construction by maintaining a bypass system of pumps and hoses (Record 56, Carlson Aff., Ex. 5, pp. 122-123). If Musson had failed to maintain temporary drainage, Ryan

Schanhofer would have so notified Musson to ensure compliance. Id.

ARGUMENT

There was no contractual duty requiring Musson to “maintain proper drainage.” There was no ministerial duty requiring any party to “maintain proper drainage.” No such provision exists in the contract, and no such duty exists under well-established Wisconsin law.

Showers presents two issues for review. The first issue pertains to the doctrine of governmental contractor immunity as set forth in *Estate of Lyons v. CNA Ins. Companies*, 207 Wis. 2d 446, 558 N.W. 2d 658 (Ct. App. 1996) and its progeny. The second issue pertains to the “ministerial duty” exception to governmental immunity. As presented by Showers, the two issues are inextricable: a duty which is ministerial, by definition, leaves nothing for discretion, yet Musson, Showers argues, was given too much discretion by the government. Showers cannot, under Wisconsin law, have it both ways.

In its brief before this Court, Showers states: “It cannot be held as a matter of law that a specification that states an overall objective, but not how to accomplish it, can be

reasonably precise.”[sic] p 23. The belief that an “overall objective” is the same thing as an “outcome” belies each issue which Showers has presented on appeal. Showers begins with a consequence—flooding—and works backwards to find someone at fault, doing nothing more than offering some hindsight suggestions of things that might have worked better. This is exactly the type of lawsuit against governments and governmental contractors that immunity exists to prevent. Summary judgment for both the City and Musson was proper.

A. Immunity under *Lyons* should attach to Musson under the facts of this case. The contracting governmental entity, the WDOT, approved “reasonably precise specifications,” and Musson conformed to those specifications.

Showers, having elected not to appeal the trial court’s grant of summary judgment to the City, devotes most of its appeal to the issue of contractor immunity, suggesting that the doctrine has been applied inharmoniously in the lower courts. There is no conflict among the Court of Appeals decisions on the issue presented by Showers: a contract specification can be reasonably precise while leaving some choices to be made by the contractor.

Lyons confers statutory government immunity to contractors acting as agents of the government under certain

conditions. The doctrine is generally stated as a three part inquiry: (1) Did the government authority approve reasonably precise specifications? (2) Did the contractors actions conform to those specifications? (3) Did the contractor warn the supervising government authority about possible dangers known to the contractor but not the government? *Lyons*, at 457-8.²

The focus of the *Lyons* inquiry should be on “who had retained ultimate responsibility” for the project in which the contractor was engaged. *Lyons*, at 454.

If the government retained ultimate responsibility for the project, the contractor should be immune, just as state authorities would be, because the court would otherwise be placed in the position of having to examine the merits of what was really a political choice. *Id.* Wisconsin law has long since recognized immunity for governmental decisions in order to

² The third condition of the *Lyons* doctrine, enunciated in the manufacturing context, takes contractor immunity away if the contractor failed to disclose a defect, lest contractors attempt to pull the wool over the eyes of the government and taxpayers when making a bid. For example, if Ford submitted a low bid to a city for a new fleet of municipal vehicles, and the company unloaded its inventory of Pintos knowing, but not disclosing, that the cars were fire-prone, Ford would not be immune from liability as a government contractor under *Lyons*. Fortunately, in *Lyons* and the cases applying it, this type of egregious conduct is never alleged. The third prong, as Showers concedes, is not at issue here.

insulate legislative policy decisions from the courts, which are viewed as being an “inadequate crucible for testing the merits of social, political and economic decisions. ” *Gordon v. Milwaukee County* 125 Wis.2d 62, 370 N.W.2d 803, (Ct. App. 1985). “It makes little sense to insulate the government against financial liability” when the government does something itself, but not when it contracts for that same thing. *Boyle v. United Technologies Corp.*, 487 U.S. 500, 108 S.Ct. 2510, 101 L. Ed.2d 442 (1988).

In its brief to the Court of Appeals, Showers argued that certain WDOT-Musson contract provisions amounted to a “reasonably precise specification” requiring Musson to “provide proper drainage.” Showers reasoned that because its property flooded, Musson must not have conformed to this reasonably precise directive.

In its brief to this Court, Showers has changed its tune. Showers now argues that Musson should not be entitled to immunity because the WDOT did not provide reasonably precise specifications; instead, the government gave the contractor unfettered authority to do as it pleased. Because the Showers property flooded, it reasons that the government

should have told Musson more precisely how to keep it from flooding.

Showers' tellingly contradictory arguments regarding the *Lyons* test are both circular in the same way. Either Musson **did** have an express contractual duty to keep its property from flooding, or Musson **should** have had an express contractual duty to keep its property from flooding. Since the issues before this court are limited to those presented in Showers' petition for review, it is assumed that Showers believes that the WDOT-Musson contract was not reasonably precise.

The second issue presented for review is legally inconsistent with the first: Showers argues that under the WDOT-Musson contract, Musson had a ministerial duty to keep its property from flooding, based on the same provisions that Showers has previously argued were reasonably precise, but no longer believes are reasonably precise. The provisions that Showers argues amount to a ministerial duty to "maintain proper drainage" in a manner such as to keep its property

from flooding are as follows (Record 52, Ex. DP48, pp. 39, 52, 100):³

105.5.2: Cooperation Between Contractors

(1)The department may, at any time, contract for or perform other work on or near the work covered by the contract. Cooperate with other contractors engaged upon or near the work.

(2)The contractor shall, or the engineer may, direct the contractor to: 1. Schedule and conduct the work to avoid interference with the operations of other contractors engaged upon or near the work. 2. Perform the work in the proper sequence in relation to that of other work in the area. 3. Join the work to that of others in a manner consistent with accepted manufacturing or construction industry practices. 4. Conduct operations and maintain the work so that adequate drainage is provided at all times. (Emphasis added.)

(3)The contractor is responsible for damage done by the contractor or the contractor's agents to work performed by other contractors. The engineer will resolve disputes between 2 or more contractors, engaged upon or near the work, regarding the rights of each under their respective contracts.

107.14: Contractor's Responsibility for Work

(1) Until the engineer accepts the work as specified in 105.11 the contractor shall maintain charge and care of

³ Showers cites a few other provisions and makes a couple more arguments not involving drainage: it argues that 107.22 Contractor's Responsibility for Utility Facilities, Property, and Services required Musson to tell Showers that the storm sewer was being disconnected. The specification applies to utility providers, not end users. It also notes that section 107.11.1(2) states that a contractor "must use every reasonable precaution to prevent damage to all property including ... all underground structures including water or gas shut-off boxes, water meters, pipes, conduits, etc.; within or outside the right of way" and appears to argue that not every precaution to prevent damage to property was taken, which, again, is a hindsight analysis which defeats the purpose of immunity.

the work except as specified in 104.6. Within 107.14, the term “work” is redefined to mean “the work product that is completed in its final position and is incorporated in the project.” Protect all of the work against injury or damage caused by the action of the elements, or from any other cause, whether arising from the execution or non-execution of the work. Rebuild, repair, restore, and make good all injuries or damages to any portion of the work occasioned by the above causes at no additional cost to the department.

(2)The contractor shall not bear the expense for damage to the work caused by abnormal and unforeseeable occurrences beyond the control of, and without the fault or negligence of, the contractor. These abnormal and unforeseeable occurrences include but are not limited to the following: 1. Cataclysmic phenomena of nature, 2. Acts of the public enemy, 3. Acts of government authorities.

(3) Before suspending the work, take the necessary precautions to prevent damage to the project; prevent traffic accidents, and provide for normal drainage. Erect necessary temporary barricades, signs, or other facilities at no expense to the department except as specified in 104.6 (Emphasis added.)

(4)The contractor is responsible for all damages to equipment and supplies regardless of the circumstances.

205.3.3 Drainage During Construction

(1) During construction, maintain roadway, ditches, and channels in a well-drained condition at all times by keeping the excavation areas and embankments sloped to the approximate section of the ultimate earth grade. Perform blading or leveling operations when placing embankments and during the process of excavation except if the excavation is a ledge rock or areas where leveling is not practical or necessary. If it is necessary in the prosecution of the work to interrupt existing surface drainage, sewers, or underdrainage, provide temporary drainage until completing permanent drainage work. (Emphasis added.)

- (2) If storing salvaged topsoil on the right-of-way during construction operations, stockpile it to preclude interference with or obstruction of surface drainage.
- (3) Seal subgrade surfaces as specified for subgrade intermediate consolidation and trimming in 207.3.9.
- (4) Preserve, protect and maintain all existing tile drains, sewers, and other subsurface drains, or parts thereof, that the engineer judges should continue in service without change. Repair, at no expense to the department, all damage to these facilities resulting from negligence or carelessness of the contractor's operations.

Showers, in its briefs on appeal, has referred to the contract as imposing a requirement to “maintain proper drainage,” or “maintain adequate drainage.” In its brief before this court, it most heavily relies on the phrase “maintain proper drainage.” No contract provision cited by Showers says anything about a duty to “maintain proper drainage.” Showers has misrepresented the actual black-and-white words used in the provisions it cites. Showers has also misconstrued the context in which the words are presented. Showers, over and over again, recites language from this contract that does not exist. For Showers to come before this court and argue that the contract says something that it plainly did not say is disingenuous in the very least.

After muddling through Showers' misrepresentations,⁴ it is apparent that the only provision applicable here is section 205.5.3: "If it is necessary in the prosecution of the work to interrupt existing surface drainage, sewers, or underdrainage, provide temporary drainage until completing permanent drainage work." Section 105.2.2 uses the term "adequate drainage," but when the rest of the section is read, it is clear that the provision applies to operations between multiple contractors and the relationships and duties among those contractors, which is not an issue here. Section 107.14 uses the term "normal drainage," but when the rest of the sentence is read, it is clear that the provision applies to situations when construction is stopped, which was not the case here.

An examination of the one applicable provision pertaining to "drainage" which Showers cites shows that it was reasonably precise, evaluated and approved by WDOT, and complied with by Musson. The government directive to provide temporary drainage until completing permanent

⁴ It is, however, difficult to not to underscore the manner in which Showers has altered the contract language in its briefs. Showers has rewritten the words of the contract and presented its revision as true. It is not argument; it is misrepresentation. The contract simply does not say what Showers is telling the Courts it says.

work, even while providing Musson the discretion to select (under close supervision) the “means and methods⁵” by which it would do so, did not confer unfettered discretion.⁶ There are basically only three industry-accepted methods of providing temporary drainage on a construction site (Record 56, Ex. 5, pp. 49-50). Musson, under the supervision of WDOT, chose a temporary system of pumps and hoses, which is one of the industry-accepted methods. Id.

“[S]pecifications need not spell out every minute detail of a project to qualify as ‘reasonably precise.’” *Bronfeld v. Pember Companies, Inc.*, 2010 WI App 150, 330 Wis.2d 123, 792 N.W.2d 222, at 25. Showers has given no reason to

⁵ The provision reads: “105.1.1(4) Supervise and direct the work competently and efficiently. Devote the attention and apply the expertise necessary to perform the work as the contract specifies. Monitor the work in progress to ensure that the work conforms to the contract. The contractor is solely responsible for the means, methods, techniques, sequences, and procedures of construction. The contractor is not responsible for the negligence of others in the design or specification of specific means, methods, techniques, sequences or procedures of construction described in and expressly required by the contract.” (Record 33, Ex. 6, p. 34.) (Emphasis added.)

⁶ The City of Oshkosh was not the government entity with control of the project. It was not the City’s project. When Showers argues that the City was helpless to tell Musson to do something differently, Showers may be correct to an extent, but the argument is a red herring. Here, the inquiry is whether the contracting governmental entity approved of the contractor’s actions, and that was the WDOT, not the City. The WDOT controlled the project, provided a daily supervisor and oversight, and had the ability to stop the project or control various aspects of it. The City was not a part of the contract and whether the City had these contractual abilities is not part of the inquiry.

expand on or alter the *Lyons* doctrine under the facts of this case. No court applying *Lyons* has wanted to give contractors unfettered discretion when they work for the government, while recognizing that contracts need not be prophetic and encyclopedic.

Under these facts, to hold that Musson did not “provide temporary drainage,” which it undisputedly did, would require a finding that public works systems must be perfect. To satisfy Showers under these facts, whatever Musson was doing had to be fail-proof for any storm event. Ultimately, the argument advanced by Showers demands a ruling that takes away long-established immunity for the design and implementation of public works.

Showers proffers no evidence that WDOT did not approve the design of Musson’s temporary drainage system. Likewise, Showers proffers no evidence that WDOT did not supervise the installation of Musson’s temporary drainage system. On the contrary, WDOT stated that Musson’s choice was within the range of industry-accepted methods from which WDOT itself would have made a selection.

As stated in *Lyons*, prongs one and two “ensure that the challenged design is within the class of official decisions that should be insulated from judicial scrutiny and that the design feature being challenged was actually reflected upon by a government official.” *Lyons*, at 457, citing *Boyle*, 487 U.S. at 512. Under *Lyons*, Musson is immune.

B. There is no ministerial duty to “maintain proper drainage,” either under the contract documents or the *Cords* exception to immunity.⁷

Despite its inability to articulate a consistent theory of contractor liability within the *Lyons* framework, the second issue Showers presents for review has been reiterated the same throughout its briefing. It is this second issue that reveals what the Showers appeal is really all about. Showers argues that Musson had a “ministerial duty” to “maintain proper drainage” at or near the Showers property. In support of this argument, Showers re-cites those cherry-picked provisions listed above, working backwards from the consequence—flooding—to argue that Musson had an absolute, certain and imperative duty to prevent that consequence under the contract. Alternatively, Showers

⁷ *Cords v. Anderson*, 80 Wis.2d 525, 259 N.W.2d 672., (1977).

argues that the rains that ultimately fell in Oshkosh posed a known and compelling danger such that there was no discretion not to act.

1. There was no ministerial duty to keep Showers' property from flooding in the contract documents.

The Showers argument is “illustrative of a recurrent problem” in which a plaintiff “confuses the issue of negligence with that of immunity” in a “circular” manner which “completely misconstrues the test for determining when a duty is ministerial” by looking backwards from a consequence. *Kimps v. Hill*, 200 Wis.2d 1, 10-12, 546 N.W.2d 151 (Wis. 1996):

The test for determining whether a duty is discretionary (and therefore within the scope of immunity) or ministerial (and not so protected) is that the latter is found only when the duty is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode, and occasion for its performance with such certainty that nothing remains for judgment or discretion. *Kimps*, 10-11.

On June 8, 2008, there was a 25-year rain event. On June 12, 2008, there was a 75-year rain event. The plaintiffs allege they were flooded on both June 8 and June 12 (Complaint, ¶¶ 18, 20). The initial Oshkosh stormwater sewer

system on 6th Avenue and Ohio Street was designed to accommodate no more than a 2-5 year rain event. The new stormwater system constructed by Musson was designed to accommodate no more than a 10-year rain event (Record 57, ¶6).

The capacity of the system, or more to the point in this case, the lack of the capacity of the system, is not actionable as negligence. In *Allstate Ins. v. Metropolitan Comm.*, 80 Wis. 2d 10, 16, 258 N.W. 2d 148, (1977), the Court stated:

Where, when and how to build sewer systems are legislative determinations imposed upon a governmental body. It is not for the court to be the judge or jury to “second guess” them in these determinations, nor to find them liable for negligence.

“The design, approval and construction of a sewer system is a discretionary act, entitling a municipality to immunity from any claim that challenges the design and construction of the sewer system.” *Caraher v. City of Menomonie*, 2002 WI App 184, ¶12, 256 Wis. 2d 605, 649 N.W. 2d 344.

It is clear that decisions regarding the adoption, design and implementation of public works are discretionary, legislative or quasi-legislative acts subject to immunity.

Milwaukee Metropolitan Sewerage Dist. v. City of Milwaukee, 2005 WI 8, 277 Wis.2d 635, 695 N.W.2d 658, ¶60, p. 678, citing *Allstate*, at pp. 15-17. “Approval of the design and construction of a public work are generally discretionary acts Even if the system is poorly designed, a municipal government is immune from this discretionary act.” *Id.*, quoting *Welch v. City of Appleton*, 2003 WI App 133, ¶ 13, 265 Wis. 2d 688, 698, 666 N.W. 2d 511.

The City cannot see why the design and construction of a temporary drainage system, while a permanent drainage system is being replaced, is any less discretionary than the design and construction of the system being replaced or the replacement system. Showers offers no factual or legal reason why a temporary system should be treated differently than a permanent system.

In the trial court, Showers claimed that the City failed to operate a sewer system with sufficient capacity; on appeal, it argues the same thing, but as to Musson. Musson should be no more obligated than WDOT or any municipality to design, construct, and operate a storm sewer system with a certain capacity.

The purpose of immunity, for both governmental entities and for contractors, is to prevent this exact type of tort law second-guessing legislative decisions. Showers' basement flooded because of a massive rainstorm that overwhelmed the drainage system. The City was declared a natural disaster area. Showers' neighbors' basements flooded too. Basements flooded and property was damaged in 75% of the City of Oshkosh. Not just in areas of construction, not just in areas where the street was torn up. Showers cannot possibly prove that more pumps or bigger pumps, or a more gradual pavement removal would have spared the property. Showers seeks a finding that Musson had a duty to implement a temporary drainage system that had a capacity to handle a rain event approximately 20 times greater in severity than the drainage system being replaced, and over seven times greater in severity than the replacement drainage system.

2. The known danger exception to immunity should not apply.

Showers next argues that because "everyone was well aware of the potential for more rain," immunity should not attach under the known danger exception. The known danger exception to immunity was first recognized in *Cords v.*

Anderson, 80 Wis.2d 525, 259 N.W.2d 672 (1977). *Cords* held that in some limited circumstances there can be a condition that is so compellingly dangerous that a duty may arise which is “so clear and absolute” that it becomes ministerial, even if no duty was created by statute or rule. *Cords*, at 542. In *Cords*, the Court found that a park manager had a duty to erect warning signs when a walking path led to a ninety-foot drop off from a cliff into a gorge that was hidden from the public, but known to the park manager. *Id.* at 538.

The *Cords* exception is extremely limited and has “rarely been asserted successfully.” *Kierstyn v. Racine Unified School Dist.*, 228 Wis.2d 81, 95, 596 N.W.2d 417 (1999). Only when a “danger is compelling and known to the officer and is of such force that the public officer has no discretion not to act” does the exception apply. *Cords*, at 96. The exception does not apply when the probability of the danger is not of such a high degree so as to deprive a state officer of discretion. *Id.* ; *Kimps* at 17-18. The mere possibility of danger is not imminent danger of such force so as to leave nothing to discretion. *Barillari v. City of Milwaukee*, 194 Wis.2d 247, 533 N.W.2d 759 (1995).

On June 12, 2008, Oshkosh was hit by a 75-year storm. There is a 1.3% chance of a storm of this magnitude occurring in any given year. Showers' argument that a rainstorm with a probability of occurring once every 75 years poses a compelling and known present danger such as to leave no room for officials not to act has no merit. It also begs the capacity question. There is no "clear and absolute" response which Musson, Oshkosh, or the WDOT could have undertaken to prevent damage from this storm. Regardless of the capacity of the temporary drainage system, flooding on Ohio Street in the construction area would have occurred because flooding in adjacent drainage basins overflowed into the Ohio Street drainage basin (Record 57, ¶ 7).

CONCLUSION

It is very unfortunate that Showers' property was damaged from flooding. The City suffers when one of its businesses is damaged by flooding. However, the level of flood protection, and the frequency and cost of replacing and upgrading that protection, are legislative decisions subject to immunity.

Dated this _____ day of December, 2012.

SILTON SEIFERT CARLSON, S.C.

By: _____
Bree A. Madison, # 1065713
Richard J. Carlson, # 1013627

331 E. Washington St.
Appleton, WI 54911
(920) 739-2366
Fax (920) 739-8893

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3060 words.

Dated this _____ day of December, 2011.

SILTON SEIFERT CARLSON, S.C.

By: _____
Richard J. Carlson,
State Bar No. 1013627

331 E. Washington St.
Appleton, WI 54911
(920) 739-2366
Fax (920) 739-8893

**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 ____ day of December, 2011.

SILTON SEIFERT CARLSON, S.C.

Richard J. Carlson, SBN 1013627

**CERTIFICATE OF COMPLIANCE
WITH RULE 809.80(3) & (4)**

I hereby certify that:

I have today caused the requisite number of copies of this brief to be delivered to a third-party carrier, FedEx, for delivery to the Clerk of the Court of Appeals, in the carrier's required packaging, with payment for delivery service properly arranged, and properly addressed for delivery.

I have this day caused to be placed in the U.S. Mail, properly addressed and postage prepaid, the requisite number of copies of this brief, to opposing counsel.

Dated this ____ day of December, 2012.

SILTON SEIFERT CARLSON, S.C.

Richard J. Carlson, SBN 1013627

RECEIVED

SUPREME COURT OF WISCONSIN

01-03-2013

**CLERK OF SUPREME COURT
OF WISCONSIN**

SHOWERS APPRAISALS, LLC, REAL
MARKETING, LLC AND MARK W. SHOWERS,

Plaintiffs-Appellants-Petitioners,

v.

District: 2
Appeal No.: 2011AP001158
Case No.: 2009CV001438

MUSSON BROS., INC. AND WEST BEND
MUTUAL INSURANCE COMPANY,

Defendants-Respondents-Cross-Appellants,

LEAGUE OF WISCONSIN MUNICIPALITIES MUTUAL
INSURANCE COMPANY AND CITY OF OSHKOSH,

Defendants-Cross-Respondents.

**DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS',
MUSSON BROS., INC. AND WEST BEND MUTUAL INSURANCE COMPANY,
RESPONSE BRIEF**

MCCANNA, DUDAS & KEWLEY, S.C.
Attorneys for Defendants-Respondents

DAVID G. DUDAS
State Bar No. 1018987
JOSEPH P. PUTZSTUCK
State Bar No. 1076049

47 Park Place, Suite 700
P.O. Box 1857
Appleton, WI 54912-1857
(920)734-2825

I. **TABLE OF CONTENTS**

Table of Authorities.....	ii
Statement of Issues.....	iii
Statement on Publication.....	iv
Statement of Case.....	1
I. Nature of Case.....	1
II. Procedural Status, Prior Proceedings & Dispositions.....	4
Statement of Facts.....	5
Argument.....	14
A. Musson Bros., Inc. is Entitled to Governmental Immunity as a Matter of Law.....	14
B. Musson Did Not have a Ministerial Duty Through Either Contract or Legal Exception to Maintain Proper Drainage.....	40
1. No Ministerial Duty Existed Pursuant to Contract or Otherwise.....	41
2. No Ministerial Duty Existed Pursuant to Legal Exception.....	45
c. Request for Alternative Relief.....	46
Conclusion.....	47
Certification of Length and Form.....	49
Certification with Compliance of Rule 809.19(12).....	50
Certification with Compliance of Rule 809.80(3) and (4).....	51

II. TABLE OF AUTHORITIES

<u>Allstate Insurance Co. v. Metropolitan Sewerage Commission of Milwaukee County,</u> 80 Wis.2d 10, 258 N.W.2d 148 (1977).....	15,42
<u>Anhalt v. Cities and Villages Mutual Insurance Company,</u> 249 Wis.2d 62, 637 N.W.2d 422 (Ct. App. 2001).....	15
<u>Boyle V. United Technologies Corp.,</u> 487 U.S. 500 (1988).....	25
<u>Bronfeld V. Pember Companies, Inc.,</u> 2010 WI App 150, 330 Wis.2d 123, 792 N.W.2d 222, <u>review denied</u> , 2011 WI 15, 331 Wis.2d 47, 794 N.W.2d 900.....	30,40
<u>Caraher v. City of Menomonie,</u> 256 Wis.2d 605, N.W.2d 344 (Ct. App. 2002).....	15, <i>passim</i>
<u>Cords v. Anderson,</u> 80 Wis.2d 525, 542, 259 N.W.2d 672 (1977).....	45
<u>Estate of Brown v. Mathy Construction,</u> 313 Wis.2d 497, 756 N.W.2d 417 (Ct. App. 2008).....	34
<u>Estate of Lyons v. CNA Insurance Companies,</u> 207 Wis.2d 446, 558 N.W.2d 659 (Ct. App. 1996)...	23, <i>passim</i>
<u>Jankee v. Clark County,</u> 222 Wis.2d 151, 585 N.W.2d 913 overruled on other grounds (Ct. App. 1998).....	31
<u>Kierstyn v. Racine Unified School Dist.</u> 228 Wis.2d 81, 95, 596 N.W.2d 417 (1999).....	45
<u>Lister v. Board of Regents,</u> 72 Wis.2d 282, 301, 240 N.W.2d 610 (1976).....	41
<u>Lodl v. Progressive N. Ins. Co.,</u> 2002 WI 71, 253 Wis.2d 323, 646 N.W.2d 314	16
<u>Spencer v. County of Brown,</u> 215 WIs.2d 641, 648, 573 N.W.2d 222 (Ct. App.1997)(citation omitted).....	41

STATEMENT OF ISSUES

I. Is a contractor such as Musson Bros. Inc. ("Musson"), who acts at the direction of a State and/or municipal authority entitled to governmental immunity where that direction is written, supervisor, and verbal in nature and each and every aspect of the contractor's work under the contract is subject to the approval of the State and/or municipal authority who bears ultimate responsibility for compliance under the contract?

Circuit Court Determination: Yes. Contractors in such circumstances are afforded the protections of governmental immunity.

Court of Appeal Determination: Yes. Musson's discretion was curtailed by the ongoing presence of the DOT, which oversaw the project.

II. Did Musson have a ministerial duty regarding the drainage of water from the construction site?

Circuit Court Determination: No.

Court of Appeals Determination: No. Musson was not maintaining an existing system, a requisite fact for imposing a ministerial duty.

STATEMENT ON PUBLICATION

This matter raises questions of law which are similar to other cases addressed by Courts at every level in Wisconsin. The issue of governmental immunity for a contractor has been addressed several times, therefore, publication is not requested.

STATEMENT OF CASE

I. NATURE OF CASE

Plaintiffs-Appellants-Petitioners, Mark W. Showers, Real Marketing, LLC, and Showers Appraisal, LLC (collectively "Showers") have, throughout the entirety of these proceedings, consistently attempted to ignore the cause of any damages in this matter. Hired by the Wisconsin Department of Transportation, Musson Bros., Inc. ("Musson") acted as a private contractor under the control of the DOT and the City of Oshkosh in replacing the sewer and storm lines in a portion of the city. At all times, Musson acted in compliance with the specifications of the construction contract. Additionally, both the DOT and the City of Oshkosh had representatives constantly on site to oversee the construction process and provide directives respecting every decision concerning construction.

In June 2008, the City of Oshkosh was subjected to two separate rainfall events that could only be expected to occur once every twenty-five and seventy-five years respectively. The twenty-five year rain event occurred on June 8, 2008. This storm far exceeded the City of Oshkosh's drainage system (capable of handling only a 2-5 year rain event) and while the twenty-five year rain far

exceeded drainage capacities through the City, Musson was able to drain the rainwater from the Oshkosh construction site without significant incident using pumps and hoses. It should be noted that the WDOT designed this project and decided not to build retention ponds, leave existing storm sewers connected during construction, or otherwise provide for anything other than "temporary drainage" on the construction site.

While the pumping and drainage plans were able to withstand the rare twenty-five year storm, just four days later, on June 12, 2008, a natural disaster (as declared by FEMA) struck Oshkosh in the form of a seventy-five year rain event. As a result of this natural disaster, a large portion of the City of Oshkosh flooded as there was simply no place for the water to go. Both the Circuit Court and the Court of Appeals recognized that the magnitude of this natural disaster could not be pushed aside and ignored, as Showers has attempted to do.

Showers argues, contrary to the undisputed facts, that Musson had absolute discretionary control over the Oshkosh project. The DOT, Circuit Court and Court of Appeals all disagreed. The fact of the matter is that both in a macro sense and in a micro sense, the DOT and City of Oshkosh

were controlling the Oshkosh construction project and Musson was merely acting as a governmental agent. The entire DOT plan and the specifications included in the plan were developed and approved by the DOT.

These plans and specifications consist of volumes of pages of drawings, engineer calculations, and specifications for construction. Yet, Showers argues that Musson was not acting according to "reasonably precise specifications." In terms of focusing on the June 12, 2008 rain disaster, the City of Oshkosh (city engineer), specifically developed a "contingency pumping plan" describing precisely where pumps would be located and where pumping and drainage would be attempted. The City also instructed Musson that no pumping into adjacent basins would be permitted in the event of flooding. Musson acted in conformance with the City's contingency plan. The adjacent basins flooded and, indeed, flooded over into the construction site. The fact of the matter is, the City of Oshkosh was overcome with water as a result of the June 12, 2008 disaster. There was nothing that Musson, the DOT or the City of Oshkosh (or any other entity for that matter) could have done to prevent the flooding that occurred.

Whether the Court chooses to look at this matter from a macro point of view or focus in on the June 12, 2008 natural disaster, one element is undisputed, Musson was acting as an agent of the government and under Wisconsin law, is rightfully afforded governmental immunity in the matter.

II. PROCEDURAL STATUS, PRIOR PROCEEDINGS AND DISPOSITIONS

A Summons and Complaint were filed pursuant to chapter 893.80 (1g) of the Wisconsin Statutes on July 24, 2009, naming the City of Oshkosh and Musson as Defendants. Both the City of Oshkosh and Musson filed cross-claims against each other seeking indemnification. Musson and the City of Oshkosh both filed for Summary Judgment against the entirety of Showers' claims. Summary Judgment was granted by the Circuit Court, dismissing Showers' claims in total.

Showers proceeded next to appeal as to Musson, seeking a determination from the Appellate Court as to, (1) whether Musson qualified for immunity under the Estate of Lyons test, (2) whether Musson had a ministerial duty with respect to drainage at the construction site, and (3) whether the June 8th and June 12th storms created a known and compelling danger requiring Musson to implement pumps.

Musson also filed a Cross-Appeal against the City of Oshkosh again seeking indemnification in the alternative.

Oral arguments were heard before the Court of Appeals on February 28, 2012. On June 27, 2012 the Court of Appeals affirmed the Circuit Court's decision.

STATEMENT OF FACTS

This action arose out of claim made by Showers Appraisals, LLC, Real Marketing LLC and Mark W. Showers (Collectively, "Showers") for damages allegedly sustained as a result of flooding which occurred during the reconstruction of Ohio Street in the City of Oshkosh during June of 2008 (Record 2, Plaintiffs' Complaint). Showers alleged that the flooding took place at a time when the City of Oshkosh and Musson Brothers, Inc. ("Musson") were undertaking a project to reconstruct Ohio Street in the City of Oshkosh (Id. at pg. 3). Showers' property at issue in this matter borders Ohio Street and is located at 601 W. 6th Avenue in the City of Oshkosh (Id. at ¶ 1-3). On or about June 6 of 2003, the City of Oshkosh entered into a State/Municipal Agreement for the preliminary engineering plan development for the Ohio Street reconstruction project (Id. at ¶ 9). On or about August 1, 2007, the City of Oshkosh entered into a State/Municipal Agreement for the

Ohio Street reconstruction project in which the City of Oshkosh requested that the State of Wisconsin Department of Transportation initiate and effect the Ohio Street reconstruction project on behalf of the City of Oshkosh (Id. at pg. 3). The reconstruction project consisted of replacing the existing roadway on Ohio Street from South Park to Witzel (Id.). The reconstruction project also called for the sealing of concrete joints, water main work, and work on the sanitary sewer (Id.).

Musson worked on the Ohio Street reconstruction project pursuant to a "Contract for Highway Work" entered into with the Wisconsin Department of Transportation and approved by Governor Doyle on January 15, 2008 (Id at pg. 4). Musson performed all work pursuant to the plans and specifications prepared and developed by the State of Wisconsin Department of Transportation and approved by the City of Oshkosh (Record 36, Aff. of Darren P. Muljo, ¶ 5; Record 37, Aff. of Mark P. Cornelius, ¶ 2-6). At all times during the Ohio Street reconstruction project, Musson was required to comply with the *Standard Specifications for Highway and Structure Construction* developed by the State of Wisconsin Department of Transportation (Id. at ¶ 7). Musson was not retained to, and did not perform any design

or engineering work in connection with the Ohio Street reconstruction project. (Id. at ¶ 8). At all times during the Ohio Street reconstruction project, Musson worked as contractors implementing the plans and specifications prepared by or on behalf of the State of Wisconsin Department of Transportation. (Id. at ¶ 9).

The *Standard Specifications for Highway and Structure Construction* requires the supervising authority of the project to notify a contractor by way of written order of any work that is deemed to be nonconforming, unacceptable, or unauthorized (Record 60, Aff. of David G. Dudas, Exhibit A, § 103.3.2-105.3.2.3). At all times pertinent, the State of Wisconsin Department of Transportation and the City of Oshkosh had multiple inspectors and at least one engineer at the reconstruction work site to direct every phase and aspect of the project. (Record 37, Aff. of Mark P. Cornelius, ¶ 11) Throughout the Ohio Street reconstruction project, no written order was issued to Musson by any supervising authority and the State of Wisconsin Department of Transportation confirmed that Musson had performed all work in accordance with the specifications provided for the project (Record 60, Aff. of David G. Dudas, Exhibit B, pg. 92).

At all times, Musson Brothers, Inc., worked in the capacity of contractors to implement plans and specifications prepared by or on behalf of the State of Wisconsin Department of Transportation and was not involved in developing or designing any plans of specifications for the project at issue herein (Record 37, Aff. of Mark P. Cornelius, ¶ 8). Musson performed no engineering or design work of any kind on the project (Id. at ¶ 9). All work performed by Musson consisted solely and entirely of implementing the plans and specifications prepared by the State of Wisconsin and approved by the City of Oshkosh (Id. at ¶ 9). All work performed by Musson on this project, therefore, was at the direction of the State of Wisconsin Department of Transportation and City of Oshkosh (Id. at ¶ 10).

At all times pertinent, the State of Wisconsin Department of Transportation and City of Oshkosh had multiple inspectors and at least one engineer on site (Id. at ¶ 11). The Wisconsin Department of Transportation did, in fact, confirm that all work performed by Musson Brothers, Inc. was performed in accordance with the State and Municipal plans and specifications (Id. at ¶ 13). If any issue was encountered during the course of work on the

project, Musson could not proceed without approval of the inspectors or engineer (Id. at ¶ 14). At all times, Musson received approval and complied with the directives of the inspectors and engineers in respect to each and every phase of the project (Id. at ¶ 14).

The DOT project manager (Thomas Buchholz) agrees that Musson met or complied with all DOT specifications:

Q: In the Ohio Street Reconstruction Project, is it your opinion that Musson Brothers met the DOT Standard Specifications?

A: Yes.

(Record 60, Aff. of David G. Dudas, Exhibit B, pg. 92)

The plans and specifications in this matter are hundreds and hundreds of pages consisting of everything from detailed engineering drawings to standard specifications governing safety. **Plaintiff-Appellants-Petitioners have presented absolutely no evidence, through expert testimony or otherwise, contradicting the project manager concerning Musson's compliance with all DOT plans and specifications.**

Mr. Buchholz is a licensed professional engineer with the State of Wisconsin who has managed approximately 50 design/construction projects for the Department of Transportation (Record 60, Aff. of David G. Dudas, Exhibit

B, pg. 99-100). He is currently a project manager for the U.S. 41 project in Winnebago County (Id. Exhibit B, pg. 5). Mr. Buchholz explains that the entire City of Oshkosh flooded on June 12, 2008, and that the flooding had nothing to do with the work being performed by Musson Brothers (the storm sewer system is designed to handle no more than a 10-year rain event and the City received a 75-year rain event).

Musson was not aware of any dangers associated with the plans and specifications which were not also known to the State of Wisconsin and City of Oshkosh (Record 37, Aff. of Mark P. Cornelius, ¶ 16). Weekly meetings were held concerning each aspect of the project at issue and all work performed (Id. at ¶ 17). Both city and state officials maintained, at all times, that the system is designed to work under those circumstances and both the State of Wisconsin and City of Oshkosh expressed that there would be no deviation from the plans and specifications (Id. at ¶ 17). Both the State of Wisconsin Department of Transportation and City of Oshkosh were aware that the existing storm sewer system is designed as a surcharge system and instructed Musson to proceed with the project in accordance with the plans and specifications prepared by

the State of Wisconsin Department of Transportation and approved by the City of Oshkosh (Id. at ¶ 18).

The Ohio Street reconstruction project proceeded through the months of April, May and into June without flooding or water problems of any kind. During this time, Musson used pumps and hoses to maintain temporary drainage on the Ohio Street construction site. On or about June 12, 2008, while the Ohio Street reconstruction project was taking place, the City of Oshkosh was subjected to a 75-year rain storm. As a result, most of the City of Oshkosh, including the Ohio Street reconstruction project, flooded (Record 38, Aff. of Steven M. Ghode, ¶ 2). Pursuant to the DOT plan, Musson removed the old storm sewer system in order to install a new system along Ohio Street in conjunction with a new sanitary sewer, water, and roadway. The plans called for relocating the new storm sewer system to the side of Ohio Street (Record 60, Aff. of David G. Dudas, Exhibit B, pg. 100). The new sanitary sewer was to be located in the center of the street (Id). To install the deeper sanitary sewer required disengaging the storm sewer. Both the existing and new storm sewer were on a surcharge system (Record 37, Aff. of Mark P. Cornelius, ¶ 17-18). This meant that the outfall or discharge was below the

water level of the Fox River resulting in a storm sewer which was always filled with water (Id.). In order to install the sanitary sewer and move the storm sewer, the existing roadway needed to be removed along with the existing storm sewer and sanitary sewer piping. Naturally, the outlet needed to be bulk-headed or sealed off in order to prevent river water from flooding the project site and allowing the work to proceed.

The old storm sewer system on Ohio Street had the capacity to handle no more than a 2-5 year rainfall event. (Record 57, Supp. Aff. of Steven M. Ghode, ¶ 6). The new storm sewer had a design capacity to accommodate no more than a 10 year rain storm event (Record 33, Aff. of Steven M. Ghode, ¶ 20). In other words, neither the existing system or the new system was designed to handle anything close to a 25 year rain event, let alone a 75 year rain event. This was true throughout the City of Oshkosh which flooded severely and was declared by FEMA to have been a natural disaster (Record 57, Supp. Aff. of Steven M. Ghode, ¶ 1). That was a political choice.

It is undisputed that flooding in other parts of the city outside of the Ohio Street reconstruction area was far worse than flooding which occurred on Ohio Street. (Record

57, Supp. Aff. of Ghode, ¶ 7). Indeed, the bypass pumping system utilized on the Ohio Street construction site was far more effective in terms of dealing with the 75 year rain event than were the surrounding basins in as much as the surrounding basins flooded over into the Ohio Street drainage basin and construction site (Record 57, Supp. Aff. of Ghode, ¶ 7 and Record 60, Aff. of David G. Dudas, Exhibit C, pg. 82-83).

On June 12, 2008, Musson's bypass pumping was replaced by a contingency pumping plan developed by City engineer, Steven Gohde, for the City of Oshkosh. (R33, Aff. Of Gohde, Exhibit 8) Pumps were placed pursuant to this plan and Musson was instructed by the City of Oshkosh that it could not pump water into other basins, if those basins were flooding over. This resulted in a scenario where there simply was nowhere to pump the water (on Ohio Street or any of the other streets in the City which flooded severely that day) (Record 60, Aff. of David G. Dudas, Exhibit C, pg. 86-88).

Finally, the project engineer (Ryan Schanhofer) confirmed that the pumps were in place on June 12, 2008, until all people were ordered off the construction site due to dangerous weather. (Record 60, Aff. of David G. Dudas,

Exhibit C, Pg. 79-81). Both Mr. Schanhofer and two DOT inspectors moved from location to location to observe the pumping according to the plan developed by the City of Oshkosh. (Id. at pg. 79-89).

Given drainage capabilities throughout the City of Oshkosh as of June, 2008, the City as a whole was simply incapable of handling the water from a 75 year rain fall event. The storm sewer system existing throughout the city was simply not designed to handle that amount of water. The temporary pumping system on the Ohio Street construction site was unable to handle that amount of water plus flooding which spilled over from adjacent drainage basins.

ARGUMENT

A. MUSSON BROS. INC. IS ENTITLED TO GOVERNMENTAL IMMUNITY AS A MATTER OF LAW

The gravamen of Showers' claim is that it would not have suffered flood damage "but for" the disconnection of the storm sewer, the removal of pavement, the lack of capacity of the temporary storm drainage system or some combination of these three factors. The claims have no legal life.

The pavement was removed and the storm sewers were disconnected because this is what the WDOT plan called for.

Ohio Street was being reconstructed and new storm sewers were being installed among other things. The project was not designed to proceed with existing storm sewers connected. Nor was the project designed to proceed block by block. The plans and specifications called for removal and replacement of storm sewers as well as removal and replacement of Ohio Street. No drainage system was contemplated or required by the WDOT beyond maintaining temporary drainage only.

"The design, approval and construction of a sewer system is a discretionary act entitling a municipality to immunity from any claim that challenges the design and construction of the sewer system." *Caraher v. City of Menomonee*, 2002 WI App 184, ¶ 12, 256, Wis.2d 605, 614, 649 N.W.2d 344 citing *Anahlt v. Cities and Villages Mutual Insurance Co.*, 2001 WI App. 271, ¶ 12, 249 Wis.2d 62, 72, 637 N.W.2d 422. "It is not for the court to be the judge or jury to second guess these determinations..." *Allstate Insurance Co. v. Metropolitan Sewerage Commission of Milwaukee County*, 80 Wis.2d 10, 16, 258 N.W.2d 148 (1977). "The immunity defense assumes negligence, focusing instead on whether the municipal action (or inaction) upon which liability is premised is entitled to immunity." *Lodl v.*

Progressive Northern Insurance Co., 2002 WI 71, ¶ 17, 253 Wis.2d 323, 646 N.W.2d 314.

The storm sewer system which existed in the Ohio Street basin prior to construction was inadequate to handle a 75-year storm event. The surrounding drainage basins throughout the City of Oshkosh were also inadequate to handle a 75-year storm event. The new replacement storm sewer had a design capacity to accommodate no more than a 10-year rain event. As a result of this major storm and the drainage capacities throughout the City of Oshkosh, the City flooded very badly. This flooding spilled over into the Ohio Street construction site. The contract did not require Musson to construct a drainage system during construction to handle a 75 year rain even plus flooding from the City's other basins. Indeed the contract was expressly limited to "temporary drainage."

Appellants seem to be all over the place with respect to the issue of temporary drainage. To defeat summary judgment, however, Appellants would need to establish that the law somehow charges Musson Brothers with the duty to prevent flooding from a 75-year rain event. It does not and Appellants do not even attempt to make this argument.

Appellants suggest that Musson Brothers somehow made the wrong decision with respect to temporary drainage. For instance, Appellants are critical of the number and size of pumps selected. Appellants may also be critical of the location of pumps used to maintain drainage. At one point, Appellants even suggest that there were no pumps in place. Appellants' position is misguided. First, decisions concerning the use of pumps and hoses to maintain temporary drainage is discretionary in nature. Additionally, a reference to a person who claims to have not seen pumps wherever they happened to be standing is impertinent to the issues in this case. Simply because one or two people claim they did not see any pumps does not suggest that the pumps were not present. It simply says that the people did not see them, or did not remember them, or were not in area where the pumps were visible. The simple fact of the matter is that construction could not have proceeded without temporary drainage. Because the old storm sewer system had been removed as part of the project, any rainfall which occurred during the months of April, May and June 1-12 was obviously pumped away from the construction site to allow construction to proceed. Finally, the project engineer confirms that the pumps were in place on June 12, 2008,

until all people were ordered off the construction site due to dangerous weather:

Q: I am showing your diary entry from June 12 of 2008 beginning on page 1 of 3. Do you see that?

A: I do.

Q: You noted that extremely heavy rain began mid-afternoon and continued into the early evening, is that correct?

A: Correct.

Q: You had Luke observing the pumping and Jeremy and you moved from location to location to observe - to make observations, is that correct?

A: Of the pumping, correct.

Q: You noted that the rain is coming down in sheets. Did I read that correctly?

A: Correct.

Q: Is that a quote?

A: Yes.

Q: You noted that city officials are in the basement and there are tornados and severe weather on the horizons. Is that right?

A: Correct.

Q: You noted, I called all of my men and told them get inside. Is that right?

A: Correct.

Q: Made Mike R. - is that Mike Ramuda (Musson Brothers)?

A: Yes.

Q: - aware of the dangerous weather, is that correct?

A: Yes.

Q: He got his men off the road, as well, once he was sure all pumps were still going. Is that right?

A: Correct.

(R60, R-App. 132-133 at 79-81).

No matter how Appellants choose to phrase it, Appellants' position boils down to various criticisms of how Musson (and the WDOT) proceeded with construction (i.e. block by block, removal of pavement, removal of storm sewers, temporary drainage, etc.). At no point, however,

does Showers demonstrate (because it can not) that the manner in which Musson proceeded somehow failed to conform with the plans and specifications developed by the State or the contingency plan developed by the City.

Appellants do not claim damage associated with a 25-year rain event which occurred prior to the 75-year rain event on June 12, 2008. Likewise, no one suggests that any flooding had occurred previously. The contingency plan was developed by the City of Oshkosh following the 25-year rain event on June 8th. This simply reflects that the individuals involved were focused on attempting to deal as best as possible with a tremendous amount of rainfall which eventually overwhelmed the entire City of Oshkosh. In fact, even on June 12th, the pumping system in the construction area on Ohio Street withstood the 75-year rainfall to a **greater** extent than the surrounding drainage basins (which had nothing to do with the storm sewers on the Ohio Street construction and were separate basins all together). The best evidence of this was the fact that the portion of Ohio Street south of 9th drained into a separate basin (totally unrelated to the construction). The storm sewers on Ohio Street south of 9th were not disconnected on June 12, 2008. 9th Street is the high point and rainfall to the south of 9th

naturally flows to the south. During the storm of June 12, 2008, the drainage basin to the south of 9th actually flooded over and ran down Ohio Street to the north. As the project engineer (Schanhofer) noted:

Q: You noted here on June 12, 2008 on page 2 if you can read along with me, it was totally built up on the south side of 9th and running north over 9th and down Ohio like a river. Did I read that correctly?

A: You did.

Q: You understand that the area south of 9th drains into a separate basin?

A: Yes.

Q: It has nothing to do with the storm sewer system north of 9th?

A: Yes.

Q: You've already testified that you and the contractor maintained drainage by use of a bypass pumping system and that would be the area north of 9th, correct?

A: Correct.

Q: And this area where you had the bypass pumping system in was not flooding over into the basin south of 9th. It was the other way around, correct?

A: Correct.

Q: The basin south of 9th - in other words, not only were you guys dealing with a 75-year rain event that was falling into your basin where the construction site was located, but you were dealing with rain that actually - I am sorry - water that actually flooded into your basin from other basins, correct?

A: The basin south was running into the north basin.
(R60, R-App. 133 at 82-83).

Q: Exactly. The lay of the land actually goes away from the project or to the south, correct?

A: To 9th, yes.

Q: And on June 12 of 2008 the water was running north and over 9th?

A: Correct.

Q: Do you know why that basin to the south of 9th flooded over?

A: I had heard that it was - it just couldn't take any more water, but I don't know anything other than what I heard.

Q: The testimony in the case and records reflect that you and Musson Brothers were instructed that you could not pump water into other basins, if those basins were flooding over, correct?

A: Correct.

Q: And once those basins flooded over, you're effectively pumping not only the rainfall that is falling, but water from those other basins, correct?

A: If they flow into yours, sure.

Q: And that is exactly what happened, right?

A: For the south basin, yes.

Q: And so at that point and time there was nowhere to pump the water?

A: No.

(R60, R-App. 134 at 86-88)

Whether Appellants expert, or anyone, thinks a better temporary drainage system should have been developed, or a "means and methods" of storm sewer disconnection and pavement removal with less risk should have been developed, are not triable issues. The entirety of this position is founded in hindsight. Showers' expert's opinion is a criticism of how Musson and the City handled the storm. Showers' argument is reliant on inapplicable hindsight. Rather than dissecting this matter using hindsight, this Court must determine whether Musson was following the

reasonably precise specifications of the DOT when the alleged negligence occurred.

When analyzing the first prong of the *Lyons* test, the analysis must include the written plans for the project as well as the ongoing supervision and adjustments to those plans during the project. The undisputed facts show that Musson was following the written specifications for the construction work and was under constant supervision by the DOT. Based upon the undisputed facts present, it cannot be meritoriously argued that Musson was not following the reasonably precise directives of the DOT and the City of Oshkosh.

The Wisconsin courts have extended immunity to contractors who are implementing government plans and specifications on a DOT project for a reason. The assignment of discretion in construction projects is common and necessary. Such an assignment does not remove the protections of immunity from the contractor.

The discretion afforded Musson under the construction contract at issue here is a regularity under such contracts. The undisputed facts show that Musson operated in adherence with the specifications developed by the DOT. Additionally, Musson acted in complete conformance with the

contingency plan developed by the DOT and City of Oshkosh in preparation for what turned out to be a natural disaster on June 12, 2008. Wisconsin law is concise and consistent in affording contractors such as Musson the same immunities afforded to governmental entities.

Estate of Lyons v. C&A Insurance Companies, 207 Wis.2d 446, 558 N.W.2d 658 (Ct. App. 1996), is a seminal case in which the Wisconsin courts developed a three part test in holding that an independent professional contractor who follows official directives is an "agent" for purposes of Wis. Stat. §893.80(4) and is entitled to common law immunity. The three-prong test requires: (1) the governmental authority approved reasonably precise specifications; (2) the contractor of actions conformed to those specifications; and (3) the contractor warned the supervising governmental authority about the possible dangers associated with those specifications that were known to the contractor, but not to the government officials.

The *Lyons* decision insulated the contractor from liability for injuries alleged to have been caused by defective design work performed on a public roadway and bridge project. In *Lyons*, the plaintiffs argued that the

design of the bridge's vertical curve - a measurement reflecting an engineered hills length and height was too short and high for its proximity to the intersection, thereby blocking the uninsured driver's view of the intersection. The contractor (Strand) was hired by the municipal subdivision to design a bridge and roadway to replace a bridge that spanned a set of railroad tracks. The municipalities secured federal highway money for the project, which was administered and distributed by the Wisconsin Department of Transportation (DOT). Strand's contract defined it as independent contractor and required it to abide by existing design standards, wherever feasible, and DOT requirements. In compliance with the discretion it was afforded under the contract, Strand submitted a design for a bridge with a one hundred fifty foot vertical curve. The DOT recognized that the one hundred fifty foot vertical curve bridge design would have resulted in significant additional costs associated with raising the elevation of the adjoining roadways. To control taxpayer expense, the DOT directed Strand to design a new bridge design with shorter vertical curve. Strand responded by designing a bridge with a seventy foot vertical curve.

The DOT approved the revised plans and the bridge was constructed with a seventy-foot vertical curve.

Strand secured a trial court order for summary judgment, which was subsequently affirmed by the Court of Appeals. In affirming, the Court of Appeals adopted a three part test similar to that articulated by the U.S. Supreme Court in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988). Following the rationale of *Boyle*, the Court of Appeals, "adopt[ed] a form of governmental contractor immunity applicable to parties who contract with municipal or state authorities and are directed to perform certain tasks under that contract." The Court held that "an independent professional contractor who follows official directives is an 'agent' for the purposes of §893.80(4), Stats., or is entitled to common law immunity," provided the professional contractor can meet the three part test.

Lyons, is controlling in this instance by way of its extension of governmental immunity to a private independent contractor, Musson, who simply implemented a reasonably precise governmental directive. The Lyons Court noted that state and local governments make widespread use of independent contractors to execute certain governmental functions. If the contractors facilitating a governmental

directive could be held liable for a discretionary governmental act, the contractors would be subjected to increased risk and associated costs, and ultimately would pass those costs onto the contracting government, effectively eliminating the taxpayer benefits secured by the immunity statutes. The Court also acknowledged that it would be "fundamentally unfair" to hold a contractor liable for damages caused by a defective design when the governmental authority was responsible for its development.

In the present case, the designs were prepared by the State of Wisconsin DOT and approved by the City of Oshkosh. All specifications were developed by the Wisconsin DOT and the contractor was required to follow the Standard Specifications For Construction developed by the Wisconsin DOT. Moreover, **every phase** of the project was overseen by the government inspectors and engineers and all work performed by Musson was performed subject to governmental directive and oversight. At **no time** did Musson deviate from the State's plans and specifications. In addition, Musson was aware of no dangers associated with the project which were not also and readily known by the State of Wisconsin DOT and City of Oshkosh. In particular, Musson discussed on several occasions the fact that the storm sewer system

(existing and newly designed) was below the level of the Fox River in the City of Oshkosh. Both city and state officials maintained, at all times, that the system works as designed and both the State of Wisconsin and the City of Oshkosh expressed that there would be no deviation from the plans and specifications. Based upon these directives, Musson proceeded in accordance with the plans and specifications.

Not only were no deviations or non-compliance with specifications noted at any time on this contract, both the Wisconsin DOT project engineer (Schanhofer) and project manager (Buchholz) expressly confirm that Musson complied with the plans and specifications including DOT standard specifications for drainage during construction:

Q: In the Ohio Street reconstruction project, is it your opinion that Musson Brothers met the DOT standard specifications?

A: Yes.

Q: And in your opinion did Musson Brothers meet or comply with the DOT standard specifications for drainage during construction that was shown to you?

A: Yes.

(R60: R-App. 00129 at 92.)

Mr. Schanhofer was project engineer on the Ohio Street reconstruction project. He states:

Q: Mr. Buchholz testified that all you can do is maintain temporary drainage to the best of your ability.
A: Correct.
Q: Is that what you agree with?
A: Yes.
Q: And that was done in this case?
A: Yes.

(R60: R-App. 00132 at 78).

Had Musson's actions failed to conform to government specifications, there would be a record to demonstrate this. The *Standard Specifications for Highway and Structure Construction* provides procedural directives for addressing nonconforming work (R60: R-App. 00127). Section 105.3.2 addresses Nonconforming work:

105.3.2.1 Engineer-Accepted Nonconforming Work

(1) If the work does not conform to the contract, the engineer will determine the circumstances under which that nonconforming work may be accepted and allowed to remain in place. The engineer will document the basis of acceptance and may execute a contract change order to adjust the contract unit prices for the nonconforming work. If the contract does not specify a price adjustment, the engineer will adjust the price.

105.3.2.2 Unacceptable Work

(1) The engineer will issue a written order to remove and replace or otherwise correct nonconforming work that the engineer deems unacceptable, as defined in 101.3. If the contractor does not comply with the engineer's written order, the engineer may effect a remedy and deduct the cost from payments due to contractor.

105.3.2.3 Unauthorized Work

(2) The department may elect to not measure or pay for unauthorized work. The engineer may issue a written directive to remove unauthorized work at no expense to the department. If the contractor does not comply with the engineer's written directive, the engineer may remove unauthorized work and deduct the cost from payments due the contractor.

(Id.)

By contract, any work done by a contractor that is deemed to be nonconforming, unacceptable, or unauthorized is to be accompanied by a written order from the supervising authority. If no such order is issued, it follows that the work done by the contractor is accepted by the authoritative body.

In this matter, there was no issuance of a written order of any sort to Musson. There can be no dispute that Musson was in full compliance with the orders set forth by the governmental body. Musson acted in full compliance with the provided specifications at all times. Musson **did not deviate** from these specifications in any manner whatsoever throughout the Ohio Street reconstruction project. As such, Musson meets the three-prong test set forth in Estate of Lyons and must be afforded governmental immunity in this matter.

Despite a wealth of evidence to the contrary, Showers' continues to argue that the DOT and City of Oshkosh did not approve of Musson's discretionary decisions and that Musson's actions somehow did not conform to the DOT and City of Oshkosh's specifications for the construction project. Such a position actively ignores the undisputed facts and is wholly without merit. This is evidenced by the extent to which Showers **argues** the point but fails to cite the record to demonstrate as much. The evidence on this point is irrefutable and, therefore, has not been refuted by Showers. WDOT was responsible for and did oversee "every single aspect" of construction. The project proceeded through the wet months of April and May. The project proceeded through a major 25 year storm on June 8th. The City specified a new pumping plan which was implemented on June 12th. This plan, like the rest of the City's drainage, was insufficient to prevent the natural disaster which occurred.

Showers' position requests the Court to ignore several well established cases directly dealing with this subject matter. In this respect, our case is directly on point with *Bronfeld v. Pember Companies, Inc.*, 792 N.W.2d 222 (2010). In that case, the court found no evidence that

Pember failed to comply with the barricade and sign specifications in the project manual and traffic control plan. The court stated as follows:

"While the Bronfelds insinuate that Pember should have done something different from what the specifications required, they have not presented any evidence that Pember did not comply. Because the undisputed evidence demonstrates that Pember complied with the specifications, Pember has satisfied the second prong of the Lyons test."
Bronfeld, 792 N.W. 2d @ 227.

Additionally, the courts have applied the three-part test established in *Lyons* in other cases to recognize immunity and protect professional contractors under these circumstances. In *Jankee v. Clark County*, 222 Wis.2d 151, 585 N.W.2d 913 *overruled on other grounds* (Ct. App. 1998), the Court of Appeals affirmed the decision of the trial court in holding that the three-part test was met and that the contractor was, therefore, entitled to immunity.

In *Jankee*, plaintiff sustained injuries when he fell while attempting to escape through a window on the third floor of the Clark County Health Care Center (CCHCC) where he was voluntarily confined. Jankee was involuntarily committed to CCHCC in a Chapter 51 proceeding on the ground that he was a danger to himself and others.

CCHCC is a nursing home and psychiatric hospital. In the early 1980s it began a major renovation of its building and hired the firm Hammel, Green and Abrahamson, Inc. (HGA) as the architect for the project. Based on the programming desires of CCHCC, the discussions with CCHCC personnel, and various state and federal requirements, HGA drafted the performance specifications for the project. HGA and the county entered into a contract with J.P. Cullen and Sons, Inc. as general contractor for the project, and Cullen entered into a subcontract with MILCO for the windows. As part of the bidding process, MILCO submitted shop drawings of its proposed products to Cullen, which submitted them to HGA for review and approval. HGA approved MILCO's drawings as meeting the specifications.

Jankee asserted claims of negligence in the design and construction of the windows against MILCO for failure to design and manufacture a reasonably safe product and failure to warn of the defective and dangerous condition of the window for use in a locked psychiatric ward. The defendants moved for summary judgment. The trial court granted the motions, dismissing all claims against all defendants. The court concluded that HGA, Cullen and MILCO were all entitled to immunity as government contractors

under *Lyons* because the County had approved reasonably precise specifications regarding the windows; the windows met those specifications, which included the change order approved by the County; and there was no danger in the use of the windows that was known by any contractor but unknown to the County which the contractor did not disclose.

In finding that the contractors were immune from liability, the Court applied the three-part test. As to the first element, the Court held that the governmental unit must do more than simply accept, without any substantive review or evaluation, the contractors exercise of discretion in meeting a given performance standard. The purpose of the first element is to make sure that the governmental unit has actually exercised its discretion by reflecting on the design feature or performance standard at issue. In this case, CCHCC personnel selected the features of the windows. The specifications approved by the County described a very particular type of window and the County approved the features.

As to the second element, the windows provided were precisely the MILCO W-21T windows specified.

As to the third element, there was no evidence that any of the contractors were aware of any danger that the County was not aware of with respect to the windows.

Further, the *Lyons* test was recently applied in the *Estate of Brown v. Mathy Construction*, 313 Wis.2d 497, 756 N.W.2d 417 (Ct. App. 2008). On June 22, 2002, Joanna Brown was driving on a highway under construction as part of a DOT project when her car struck an exposed bridge abutment and caught fire. Joanna and her nine-year-old daughter, Dallas, were fatally injured.

Mathy was DOT's prime contractor for the project. The bridge abutment that Joanna's car struck was exposed due to construction. As part of the project, workers removed bridge guardrails that provided some protection to bridge users, and after further roadwork, replaced them with new guardrails, referred to as "energy absorbing terminals" (EATs). DOT had decided to keep the road open during construction, but specified required safety measures while the work was in progress, including signs and drums. DOT also specified that the construction work was to begin on April 15, 2002 and be completed in 60 working days.

Workers completed the removal of old guardrails throughout the project site by April 25, 2002. On May 29,

2002, workers began installing the EATs, and this process continued along the project area through June. The three-mile stretch of STH 131, where the accident occurred was one of the last project areas where the EATs were installed. As of June 22, the date of the accident, EATs had not yet been installed there. The entire project was completed by early June, within the 60 days allotted by DOT.

The Estate claimed that Mathy was not entitled to governmental immunity because the *Lyons* test for contractor immunity had not been met. The court disagreed.

The court noted that under *Lyons*, governmental immunity extends to private parties who act under directives from state agencies. An independent professional contractor who follows official directives is an "agent" for purposes of Wis. Stat. §893.80(4) or is entitled to common law immunity when the three-prong *Lyons* test has been satisfied.

The Estate argued that Mathy did not meet the first prong for governmental immunity because the State did not provide Mathy with reasonably precise specifications for when to install the EATs. The State argued that Mathy would only be entitled to immunity if DOT had specifically

instructed Mathy not to install the EATs for a specific amount of time after it was feasible to do so. The estate asserts the only time requirement was that Mathy install the EATs within the 60 day period for the entire project.

The Court held that the Estates' specifications argument missed the mark. The question was not whether DOT did or did not specify the amount of time the abutment was to be unprotected by a guardrail. This formulation of the issue ignores safety precautions that were specified. It makes no sense to isolate the 60-day timing specification for the overall safety requirements. **The question was not what other safety precautions might have been taken, but whether safety requirements provided by the DOT were "reasonably precise specifications."** The undisputed evidence demonstrated that they were. DOT's plans for the project, for example, provided several pages of required safety measures during construction, including official road signs, drums placed at 50-foot intervals, delineator posts, and pavement markings. DOT also provided a diagram showing placement of the traffic control measures to be used for lane closure, such as signs and flaggers, and diagrams specifying the pavement markings that should be made.

As to the second prong, the Estate did not argue that Mathy failed to follow any of the safety precautions specifications.

As to the third prong, the Estate did not argue that Mathy knew about something that DOT did not. A review of the record revealed nothing suggesting that there were dangers known to Mathy, but not to DOT.

Because the undisputed facts showed that (1) DOT provided Mathy with reasonably precise specifications as to how to carry out the road construction project; (2) Mathy's work conformed to DOT's project specifications; and (3) DOT was aware of the dangers that the exposed bridge abutment may have presented, the Court held that Mathy was entitled to governmental contractor immunity.

Our case is directly analogous to the cases in which the courts have granted immunity to an independent professional contractor. Musson meets the three-prong test.

As to the first prong, the State of Wisconsin DOT provided Musson with reasonably precise specifications for how to carry out the project. Indeed, the State spent considerable time developing and preparing very detailed plans and specifications for this project, including special provisions and all performance standards (State

DOT). Musson was not retained to do any design or engineering work and performed no design or engineering work. Musson simply implemented the plans and specifications prepared by the State of Wisconsin DOT. While Showers would have the Court believe that the construction project was completed with little to no guidance from the government, the Affidavit of Mark P. Cornelius reveals that the DOT provided Musson with hundreds of pages of plans and specifications for the project (R37). The DOT provided Musson with reasonably precise plans and specifications to which Musson fully complied. As evidenced through well established Wisconsin law, the discretion afforded to Musson as an agent of the government falls under the protections of immunity because any discretionary actions were taken in full accordance with the controlling reasonably precise specifications developed by the DOT and City of Oshkosh.

As to the second prong, Musson's work conformed to the DOT's project plans and specifications and directives. At no time during the course of the project did Musson deviate from the plans, specifications, and directives of the State of Wisconsin DOT. The WDOT engineer and project manager confirm that Musson complied with WDOT plans and

specifications, including specifications for the poorly drainage. Had Musson deviated from WDOT plans and specifications, a written warning or advisement would have been generated requiring that such deviation be corrected within a specified time period. **No written warnings or directives were issued concerning any deviation material to this case.** In fact, the DOT had inspectors and engineers on site **at all times** to ensure compliance by Musson with the Wisconsin DOT plans and specifications. All work was performed pursuant to the directives of those inspectors and engineers who approved all work performed by Musson as to each and every aspect of the project. This is not in dispute despite Showers' assertions to the contrary.

As to the third prong, Musson's compliance with the elements contained within the third prong of the *Lyons* test has been conceded by Showers and, therefore, is not at issue.

Accordingly, Musson meets the three-part test established by the Court in the *Estate of Lyons*, wholly justifying both the Circuit Court and the Court of Appeals' Orders granting summary judgment.

**B. MUSSON DID NOT HAVE A MINISTERIAL DUTY THROUGH
CONTRACT OR LEGAL EXCEPTION TO MAINTAIN PROPER
DRAINAGE.**

In the summer of 2008, Musson was implementing reasonably precise plans and specifications for construction developed by the DOT. Implementation of such plans and specifications is discretionary. "The design, approval and **construction** of a sewer system is a discretionary act, entitling a municipality to immunity from any claim that challenges the design and construction of the sewer system." *Caraher* at ¶ 12 (emphasis added). Accordingly, Musson is afforded immunity.

A contractor is an agent for the government for purposes of governmental immunity for discretionary acts. *Bronfeld v. Pemper Companies, Inc.*, 2010 WI App 150, 330 Wis. 2d 123, 792 N.W.2d 222, review denied, 2011 WI 15, 331 Wis.2d 47, 794 N.W.2d 900. Whether the governmental body (or contractor) failed to properly execute a ministerial duty is a question of law, not a question of fact. *Caraher v. City of Menomonee*, 256 Wis.2d 605, 649 N.W.2d 344 (Ct. App. 2002).

As the *Caraher* court further explained:

A discretionary act is one that "involves the exercise of discretion of judgment in determining

the policy to be carried out or the rule to be followed [and] the exercise of discretion and judgment in the application of a rule to specific facts. *Spencer v. County of Brown*, 215 Wis.2d 641, 648, 573 N.W.2d 222 (Ct. App. 1997)(citation omitted). In contrast, a ministerial act 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. *Lister v. Board of Regents*, 72 Wis.2d 282, 301, 240 N.W.2d 610 (1976). *Caraher v. City of Menomonee*, 256, Wis.2d 605, 649 N.W.2d 344 (Ct. App. 2002).

1. No Ministerial Duty Existed Pursuant to Contract or Otherwise.

Appellants argue that Musson should not be afforded governmental immunity because the maintenance of a sewer system is a ministerial duty rather than a discretionary one. The shortcomings of Showers' position are glaring. Musson was not hired to maintain an existing sewer system but was in the process of building a new one pursuant to

the governments' design. Showers must acknowledge that a discretionary (rather than ministerial) duty applies to the designing, planning and implementation of a sewer system.

The design and construction of a sewer system are discretionary acts. *Caraher v. City of Menomonee*, 256 Wis.2d 605, 649 N.W.2d 344 (Ct. App. 2002). Even if the system is designed in a negligent fashion (i.e. inadequate), this is deemed a political choice and the government is entitled to immunity.

In our case, Musson was in the process of implementing the governmental design by removing old storm sewers (with a capacity to handle no more than a 2-5 year event) and replacing them with new storm sewers (with a capacity to handle no more than a 10 year event). The design and specifications did not include any plans to maintain the existing system. This was a decision made by WDOT.

Showers' argument is one involving the capacity of the system. It is not disputed that a 75 year rain event occurred on June 12th. There was insufficient capacity to drain flood water from a 75 year event. The capacity of the system is not actionable as negligence. *Allstate Ins. v. Metropolitan Comm.*, 80 Wis. 2d 10, 16, 258 N.W. 2d 148 (1977). The argument advanced here by Showers seeks to use

hindsight to second guess a legislative decision regarding the capacity of the system in the City of Oshkosh.

"The design, approval and construction of a sewer system is a discretionary act, entitling a municipality to immunity from any claim that challenges the design and construction of the sewer system." *Caraher* at ¶12.

The level of flood protection and the frequency and cost of replacing and upgrading that protection are indeed legislative decisions subject to immunity. This legal principle has a dual application in our case. First, the City of Oshkosh made original decisions concerning the nature, type and amount of flood protection to provide. It then made decisions regarding the frequency and cost of upgrading that protection. The City opted for relatively minimal protection (2-5 year capacity) with infrequent upgrades. Similarly, the WDOT and City approved a construction plan without providing for increased flood protection of any kind. The project was designed to proceed with existing storm sewers disconnected and no drainage system beyond "temporary drainage" needed to allow the work to proceed.

Both Musson and the WDOT have confirmed that temporary drainage was accomplished with pumps and hoses. The old

storm sewer had been bulk-headed because it was below river level (and would otherwise have simply flooded the worksite). With bypass pumping, the work proceeded through the months of April, May and into June. In other words, Musson **temporarily** drained the site as required to allow construction to proceed as it did. The contract did not require Musson to do more. Even so, Musson pumped flood water on June 8th, and again on June 12th as specified in the City's contingency plan. This pumping proved to be even more effective at draining the storm water than the existing storm sewers in the adjacent basins. It is undisputed that those basins flooded over into the construction site and, along with water from the storm, created a situation where there was simply no place for the water to go.

Showers has provided no authority to establish any legal duty on Musson's part to prevent damage from a 75 year storm. The WDOT contract did not establish such a duty. The law does not establish such a duty. This would impose upon Musson the duty to provide flood protection many times greater than the City has decided to provide for itself.

Showers' criticisms of Musson, while unfounded, are not material to the existence of a legal duty from which liability may arise, nor the protections afforded a government contractor where such a legal duty exists.

2. No Ministerial Duty Existed Pursuant to Legal Exception.

Showers contends that "everyone was well aware of the potential for more rain" and that this knowledge created a known danger, exempting Musson from immunity.

The known danger exception may be used in circumstances which are so dangerous that a duty becomes "so clear and absolute" so as to become ministerial. *Cords v. Anderson*, 80 Wis.2d 525, 542, 259 N.W.2d 672 (1977). For illustrative purposes on what might create a known danger of this magnitude, in *Cords*, a park manager was found to have a duty to erect a warning sign for a walking path which lead to a 90 foot cliff drop-off into a gorge hidden from the public, but known to the manager. The facts contained within *Cords* illustrate exactly why this exception has "rarely been asserted successfully" *Kierstyn v. Racine Unified School Dist.* 228 Wis.2d 81, 95, 596 N.W.2d 417 (1999).

The known danger exception only applies when the danger is "compelling and known to the office and is of such force that the public officer has no discretion not to act." *Cords* at 96. The known danger exception will not apply when the probability of the danger is not of a degree as to deprive the officer of discretion. *Id.*

On June 12, 2008, the City of Oshkosh was hit by a 75 year rain event. This type of natural disaster can only be expected to happen once in a 75 year period. A storm of such magnitude has a miniscule chance of occurring. In short, a mere possibility of danger, as seen in this matter, does not rise to the level of creating a danger of such force as to remove all discretion from the officer. Accordingly, the known danger exception to liability does not apply.

C. REQUEST FOR ALTERNATIVE RELIEF

In the alternative, Respondents and Cross-Appellants respectfully ask that the decision in this matter be applied equally to Musson and the City of Oshkosh or remanded to the Court of Appeals for decision on Musson's cross appeal.

CONCLUSION

This is a matter in which the application of the law and the application of common sense necessarily reveal the same outcome. Musson acted in compliance with the specifications for construction developed by the Wisconsin DOT and at all times was subject to the control and directives of the DOT. On June 8th, 2008 the City of Oshkosh was subjected to a 25 year rainstorm and Musson was able to adequately drain the construction site despite only being obligated to provide drainage for a 2-5 year rain event. On June 12th, 2008 a natural disaster struck Oshkosh in the form of a 75 year rain event. Despite adopting and adhering to a contingency drainage plan prior to the June 12th storm, the construction site, much like the City of Oshkosh, was simply overwhelmed by water and ended up flooding. There is no evidence that Musson, or anybody, could have done anything to prevent this natural disaster. There is also no evidence that Musson failed in any way to uphold its obligations as an agent of the government on the construction project. Common sense and Wisconsin law are in unwavering agreement that Musson did nothing to cause Showers' damages, and acted wholly within the scope of its duty as a contractor for the government. Accordingly,

Musson Bros., Inc. respectfully requests that this Court
affirm Summary Judgment in this matter.

Dated this 2nd day of January, 2012.

McCANNA, DUDAS & KEWLEY, S.C.
Attorneys for Defendant-Respondent,
Cross-Appellant

BY:_____

DAVID G. DUDAS
State Bar No. 1018987

JOSEPH P. PUTZSTUCK
State Bar No. 1076049

47 Park Place, Suite 700
Appleton, WI 54912-1857
Phone: (920) 734-2825

V. CERTIFICATION OF LENGTH AND FORM

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b)and(c) for a brief with a monospaced font, 10 characters per inch; double-spaced; 1.5 inch margin on the left side and a one-inch margin on all other sides. The length of this brief is 48 pages.

Dated this 2nd day of January, 2012.

McCANNA, DUDAS & KEWLEY, S.C.
Attorneys for Defendant-Respondent,
Cross-Appellant

BY:_____

DAVID G. DUDAS
State Bar No. 1018987

JOSEPH P. PUTZSTUCK
State Bar No. 1076049

47 Park Place, Suite 700
Appleton, WI 54912-1857
Phone: (920) 734-2825

VI. CERTIFICATION WITH COMPLIANCE OF RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of the Response Brief of Respondent and Cross-Appellant which complies with the requirements of §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 certification has been filed with the court and served upon all opposing parties on this date.

Dated this 2nd day of January, 2012.

McCANNA, DUDAS & KEWLEY, S.C.
Attorneys for Defendant-Respondent,
Cross-Appellant

BY: _____

DAVID G. DUDAS
State Bar No. 1018987

JOSEPH P. PUTZSTUCK
State Bar No. 1076049

47 Park Place, Suite 700
Appleton, WI 54912-1857
Phone: (920) 734-2825

VI. CERTIFICATION WITH COMPLIANCE OF RULE 809.80(3)and(4)

I hereby certify that I have today caused the requisite number of copies of this brief to be delivered to a third-party carrier, FedEx, for delivery to the Clerk of the Supreme Court, in the carrier's required packaging, with payment for delivery service properly arranged, and properly addressed for delivery.

I have this day caused to be placed in the U.S. Mail, properly addressed and postage prepaid, the requisite number of copies of this brief to opposing counsel.

Dated this 2nd day of January, 2012.

McCANNA, DUDAS & KEWLEY, S.C.
Attorneys for Defendant-Respondent,
Cross-Appellant

BY:_____

DAVID G. DUDAS
State Bar No. 1018987

JOSEPH P. PUTZSTUCK
State Bar No. 1076049

47 Park Place, Suite 700
Appleton, WI 54912-1857
Phone: (920) 734-2825

RECEIVED

SUPREME COURT OF WISCONSIN

01-16-2013

**CLERK OF SUPREME COURT
OF WISCONSIN**

**MARK W. SHOWERS,
REAL MARKETING, LLC and
SHOWERS APPRAISALS, LLC,**

Plaintiffs-Appellants-
Petitioners,

Appeal No.:
2011AP001158

-vs-

**MUSSON BROS., INC, and
WEST BEND MUTUAL INSURANCE
COMPANY**

Defendants-Respondents-
Cross-Appellants,

**LEAGUE OF WISCONSIN
MUNICIPALITIES MUTUAL
INSURANCE and
CITY OF OSHKOSH,**

Defendants-Cross-
Respondents.

COMBINED REPLY BRIEF OF PLAINTIFFS-APPELLANTS-PETITIONERS

DEMPSEY LAW FIRM, LLP

Daniel J. Posanski, SBN 1045352
Gerardo Medina, Jr., SBN 1085890
1 Pearl Avenue, Suite 302
P.O. Box 886
Oshkosh, WI 54901
Phone: 920-235-7300
Fax: 920-235-2011

Attorneys for Plaintiffs-
Appellants-Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
ARGUMENT	1
I. Defendants Fail to Show Reasonably Precise Specifications or Approval of Decisions that Would Satisfy the First Prong of Lyons.....	3
A. The Contract Specifications Are Not Reasonably Precise.....	3
B. Neither the City nor Musson Can Cite the Record for Government Approval of Musson’s Discretionary Decisions	7
II. The Contract Delegated Discretion, Therefore Musson’s Decisions Conformed to the Contract	10
III. Showers’ <u>Lyons</u> Analysis is Not Legally Inconsistent with Its Ministerial Duty Analysis	12
CONCLUSION	14
CERTIFICATION OF FORM, LENGTH AND ELECTRONIC COPY	16

TABLE OF AUTHORITIES

Cases

<u>Bronfeld v. Pember Companies, Inc.</u> , 2010 WI App 150, 330 Wis. 2d 123, 792 N.W.2d 222	10, 11
<u>Estate of Brown v. Mathy Construction Co.</u> , 2008 WI App 114, 313 Wis. 2d 497, 765 N.W.2d 417	10, 11
<u>Estate of Lyons v. CNA Insurance Companies</u> , 207 Wis. 2d 446, 558 N.W.2d 658 (Ct. App. 1996)	1, 6-12
<u>Jankee v. Clark County</u> , 222 Wis. 2d 151, 585 N.W.2d 913 overruled on other grounds (Ct. App. 1998)	8, 10, 11
<u>Lewis v. Babcock Indus., Inc.</u> , 985 F.2d 83 (2 nd Cir. 1993)	8
<u>Raz v. Brown</u> , 2003 WI 29, 260 Wis. 2d 614, 628, 660 N.W.2d 647.....	8
<u>Showers Appraisals, LLC v. Musson Bros., Inc.</u> , 2012 WI App 80, ¶ 19, 343 Wis. 2d 623, 819 N.W.2d 316, review granted	6
<u>State v. Lindell</u> , 2001 WI 108, ¶ 23 n. 8, 238 Wis. 2d 422, 617 N.W.2d 500 <u>aff'd</u> , 2001 WI 108, 245 Wis. 2d 689, 629 N.W.2d 223.....	9
<u>Oliver v. Oshkosh Truck Cor.</u> , 96 F.3d 992 (7 th Cir. 1996)	8

ARGUMENT

This is a Reply Brief in response to both the City of Oshkosh's (the "City") and Musson Bros., Inc.'s ("Musson") Response Briefs. After reviewing both Defendants' briefs, it is abundantly clear that each believes Musson was not negligent in any way regarding the construction project. Musson in particular spends a significant portion of their brief arguing their actions were not negligent, conformed to the contract, and the flooding on Showers' property was essentially inevitable. However, both fail to recognize the issue is not yet about Musson's level of negligence. The issue is whether the Supreme Court should follow the Court of Appeal's decision to expand immunity to contractors who are delegated the authority to exercise discretion as to the "how" of construction, without substantive review, analysis or approval by the government, which is contrary to established precedent.

In addition to mischaracterizing the reason we are here, Musson utterly fails to properly address the contractor immunity analysis adopted by the Court of Appeals in Estate of Lyons v. CNA Insurance Companies, 207 Wis. 2d 446, 558 N.W.2d 658 (Ct. App. 1996). Musson does not cite a single contract specification or argue why the specifications at issue are

reasonably precise. It is telling that Musson, not once, takes a position on the “means and methods” language of the contract, choosing instead to focus on the severity of the storm. While the storm was a factor contributing to the flooding on Showers’ property, it does not pertain to this Court’s immunity analysis. Musson has taken this smoke and mirrors approach in both the Circuit Court and Court of Appeals, effectively distracting both from the real issues, Musson’s unfettered discretion and contractor immunity.

Musson and the City also attempt to confuse Showers’ argument by arguing that Showers is using hindsight analysis, demanding perfection as it pertains to drainage, while criticizing Musson’s decisions throughout the project. However, the crux of Showers’ argument is that the DOT specifications are not reasonably precise, and if there were, there is no evidence that Musson’s actions conformed to them. Showers concedes there has been criticism of Musson’s decisions, as it must, but for the purposes of this appeal and contractor immunity, Showers criticisms are not aimed of the *substance* of the decisions (though Showers believes they were negligent), but that Musson, not the DOT or City, made the decisions.

Musson admits in their own brief to this Court that “decisions concerning the use of pumps and hoses to maintain temporary drainage is discretionary in nature”. (Musson’s Brief, p. 17). Musson made these decisions. While both defendants argue that these decisions were approved, they do not, and cannot cite a single reference to the record where the DOT performed a meaningful analysis of Musson’s decisions, or gave explicit or implicit approval, because it simply does not exist. Both Defendants completely ignore Showers argument that DOT oversight alone does not rise to the level of acceptance necessary to create a reasonably precise specification. Contractor immunity simply cannot apply to Musson under these circumstances.

I. DEFENDANTS FAIL TO SHOW REASONABLY PRECISE SPECIFICATIONS OR APPROVAL OF DECISIONS THAT WOULD SATISFY THE FIRST PRONG OF LYONS.

A. The Contract Specifications Are Not Reasonably Precise.

As Showers argued in its initial brief, the Contract states that the contractor is “solely responsible for the means, methods, and techniques of construction.” (R. 52.) This particular provision cannot possibly be interpreted as reasonably precise. Perhaps as a result of this provision being so very discretionary in nature, neither the City nor Musson address

this it in their argument. When read it full, it is clear that the Contract is designed to shift liability to the contractor, only when and if the contractor itself makes a negligent means and methods decision:

“... The contractor is solely responsible for the means, methods, techniques, sequences and procedures of construction. The contractor is not responsible for the negligence of others in the design or specification of specific means, methods, techniques, sequences or procedures of construction described in and expressly required by the contract.” (R. 52.)

Nowhere in the remaining provisions of the Contract is there any description or requirement that Musson use pumps and hoses as a means of providing adequate drainage. Nowhere in the written Contract is there a requirement or description that Musson must proceed with the tear up on a block-by-block basis.¹ Musson made the decision to tear up the entire road bed and disconnect the storm sewer, upsetting the City in the process. Musson made the decision to use only a few (if any) pumps, a decision not even made until the day before the first storm event, where they were asking the DOT where in the contract it said they have to pump.²

¹ Showers maintains that the pre-construction agreement created a reasonably precise specification that was not complied with. However, if the Court finds the agreement was not reasonably precise, Musson’s decision to not proceed block-by-block certainly falls under a means and methods decision.

² The DOT pointed out the drainage requirements of the Contract. Perhaps Musson was confused since the contract does not specify the manner in which they were to satisfy these specifications.

Musson takes the disingenuous position that § 105.5.2 (requiring adequate drainage) it is only applicable to operations between multiple contractors, i.e., the maintenance of “adequate” drainage only applies to subcontractors performing at Musson’s direction, but not Musson themselves. It makes little sense and poor public policy to require a higher level of care and drainage from a subcontractor, who by nature takes direction from the general contractor, while relieving a general contractor of this duty simply because they chose not to “sub out” any of the work.

Still, the City states that Musson’s use of pumps and hoses is an industry accepted standard. While this may be true, this is again a negligence argument. The City cannot state where the Contract states Musson shall or may use pumps and hoses. Musson was not provided with any direction regarding the manner in which to maintain drainage, and was responsible if their decision proved to be negligent. Again, the specifications at issue only provided overall objectives, not obligating Musson to perform a certain way. The Court of Appeals even believed the contract specifications, considered alone, was a persuasive argument.³

³ The Court of Appeals found that immunity applied as Musson’s discretion under the contract was curtailed through the DOT oversight, not due to the contract terms themselves.

Showers Appraisals, LLC v. Musson Bros., Inc., 2012 WI App 80, ¶ 19, 343 Wis. 2d 623, 819 N.W.2d 316, review granted.

Outside of a single provision, Musson fails to address how the remaining contract provisions are reasonably precise, simply maintaining that they “implemented a reasonably precise governmental directive”, citing Lyons but failing to cite which “reasonably precise directives” they were implementing. (Musson’s Brief, p. 25). One would hope that Musson is not taking the position that the existence of a contract alone satisfies the reasonably precise prong of Lyons. Musson goes on to assert that they were required to follow every specification (without citation), with government oversight on every phase of the project by the DOT. Yet, Musson fails to advance a coherent argument on how the DOT oversight was anything more than rubber stamp approval, as Showers very clearly asserted in its initial brief. Musson instead chose to focus on the negligence aspect of this case, which is not directly before this Court.

This Court must determine if the specifications at issue are reasonably precise. This can be satisfied through the specifications themselves, or through a government entity’s meaningful analysis or review of the contractor’s discretionary decision. Showers maintains that

specifications were not reasonably precise, and the Musson's discretionary decisions were not approved. If this Court agrees, the analysis is over and immunity does not apply. However, if the Court disagrees, the analysis continues onto the second (compliance) prong of the Lyons test. It is well within Showers' right to take a position that, if the specifications are reasonably precise, they were not complied with. This not a "circular" argument, as the evidence suggests that there were no pumps on site, specifically anywhere near the Showers property, which Musson and DOT were aware had an issue with standing water. The contract requires drainage on the *entire* site, and there are several material issues of fact as to whether this was satisfied, reasonably precise specifications or not.

B. Neither the City nor Musson Can Cite the Record for Government Approval of Musson's Discretionary Decisions.

Both Defendants' assert that Musson was under the close supervision of the DOT during the course of the project. However, there is not a single citation to the record regarding how this "close supervision" was anything more than a DOT official taking notes. Both defendants completely ignore Showers' argument that simple oversight alone does not constitute acceptance. Accordingly, Showers' argument should be accepted

as true. See Raz v. Brown, 2003 WI 29, ¶ 25, 260 Wis. 2d 614, 660 N.W.2d 647 (citation omitted) (“respondents on appeal cannot complain if propositions of appellants are taken as confessed when they do not undertake to refute them.”)

The City believes Showers failure to cite evidence that the DOT did not approve the design of Musson’s temporary drainage system defeats Showers position, however this is not Showers’ burden. Lyons requires more than rubber stamp approval, this is not the same as an affirmative rejection of the contractor’s discretionary decisions. See Jankee v. Clark County, 222 Wis. 2d 151, 585 N.W.2d 913 (Ct. App. 1998); Oliver v. Oshkosh Truck Cor., 96 F.3d 992 (7th Cir. 1996); Lewis v. Babcock Indus., Inc., 985 F.2d 83 (2nd Cir. 1993). The reasoning set forth in these cases establishes a strong public policy. If a contractor is exercising its own discretion, it can still claim immunity by seeking and receiving government approval. This is not to say that a contractor will always be liable if a government entity does not approve its decision, as the contractor could still defend a lawsuit on the basis that its decision was not negligent.

Musson provides only a single statement that the assignment of discretion does not remove the protections of immunity from the contract,

yet fails to cite any authority for such a determinative position. (Musson’s Brief p. 22.) As such, Musson’s position on assignment of discretion shall not be considered. See State v. Lindell, 2001 WI 108, ¶ 23 n. 8, 238 Wis. 2d 422, 617 N.W.2d 500 aff’d, 2001 WI 108, 245 Wis. 2d 689, 629 N.W.2d 223.

Musson next appears to address second prong of Lyons, arguing that it complied with the specifications developed by the DOT (failing to cite the “specific” directives it conformed to). Besides simply stating “approval and oversight” on every aspect of the project, nowhere in its brief does Musson cite actual approval, a review, or analysis by the DOT of their decisions. Ultimately, Musson glosses over the first prong of Lyons and argues that they complied with the contract, without first establishing, or even arguing, that the contract was reasonably precise.

This Court need not look any further than the exchange between the City and DOT officials to resolve this issue of delegated discretion and acceptance. In its initial brief, Showers cited the various confrontations between the City, DOT and Musson officials regarding the block-by-block “agreement.” It is not disputed that the City was upset with Musson’s performance, even before the first storm. Having already expressed

numerous concerns and hearing the subsequent rumors Musson was performing poorly, the City asked the DOT to shut Musson down. However, since the City's concerns were regarding Musson's "discretionary decisions", the DOT refused to intervene, specifically citing the means and methods provision of the Contract.

Significantly, the DOT did not refuse to intervene on the basis of its own review and acceptance of Musson's decisions, since a review or analysis never took place. There is nothing in the record to showing the oversight on the project was *genuine* in that the DOT or City performed a meaningful review or analysis of Musson's discretionary decisions, nor should there be, as the contract made Musson the "sole source" of such decisions.

II. THE CONTRACT DELEGATED DISCRETION, THEREFORE MUSSON'S DECISIONS CONFORMED TO THE CONTRACT.

Musson appears to cite Lyons, Estate of Brown v. Mathy Construction Co., 2008 WI App 114, 313 Wis. 2d 497, 765 N.W.2d 417, Bronfeld v. Pember Companies, Inc., 2010 WI App 150, 330 Wis. 2d 123, 792 N.W.2d 222, and Jankee v. Clark County, 222 Wis. 2d 151, 585 N.W.2d 913 (Ct. App. 1998) as authority that the circumstances here are

substantially similar to those cases in that the Contract is reasonably precise, and was conformed to. Musson grossly misinterprets those decisions.

As already discussed in Showers' initial brief, Lyons involved a case where the DOT **approved and revised** the contractor's plans. 207 Wis. 2d 446, 459-460. In Mathy the safety specifications were particularly detailed, and the DOT itself made the decision regarding lag time which contributed to the accident in that case. 2008 WI App 114, ¶¶ 8, 12. In Bronfeld, the contractor was contractually **required** to submit its plan to the City Engineer, who reviewed and revised those plans before the contractor could implement them. 2010 WI App 150, ¶ 6. Finally, in Jankee, the County reviewed and approved decisions regarding the type of windows and stoppers to be used for the project. 222 Wis. 2d 151, at 157-59. The contractors simply implemented the County's negligent decisions. Id., at 171-72.

Musson's believes that since the DOT designed the project, Musson is not liable for its implementation. However, Showers position is not that the design was defective, but that Musson's decisions in implementing the design were negligent. The contract specifically delegated this decision

making authority to Musson, not subjecting it to government approval.

Unlike Lyons, where the design itself was the cause of the accident, Showers has not taken the position that the design of the storm sewer system caused the flooding at issue. Musson's reliance on each of their cited cases as it relates to the conformity to reasonably precise specifications is misplaced.

Furthermore, if there were in fact reasonably precise specifications, the DOT could not intervene on "means and methods" issues that were not expressly identified in the contract, per their own admission. (R. 52; ¶24.)

It is undisputed that Musson's decision to tear up and remove the entire storm sewer (and use/number of pumps), instead of proceeding block-by-block was a discretionary decision that raised red flags with the City and DOT. The Contract delegated this type of discretionary decision, so of course Musson's decision to do so complied with the contract.

III. SHOWERS' LYONS ANALYSIS IS NOT LEGALLY INCONSISTENT WITH ITS MINISTERIAL DUTY ANALYSIS.

The City argues that Showers' is making a legally inconsistent argument by taking the position that there was a ministerial duty to maintain drainage. Again, this is untrue. This *alternative* position is only

relevant if the court finds that the Lyons test has been satisfied. If so, an exception to immunity must be shown. While Showers maintains the contract specifications are not reasonably precise, should this Court believe they are, then this Court should also find that Musson was obligated, by law or contract, to maintain adequate drainage on the cite at all times.

The City has argued that Showers' position is that Musson did, or should have, the duty to prevent flooding. (City's Brief, p. 16). This is simply untrue. Showers' position has consistently been that Musson was required to maintain adequate drainage on cite at all times, and had the discretion in determining how to do so. Had drainage been maintained to the same level of the 2-5 year storm system being replaced, the only expert on record states that the flooding would not have occurred. Significantly, Showers' property (per City mandate) was completely reliant on the storm sewer for drainage. The system was disconnected, and no temporary drainage system was implemented in front of Showers' property. The flooding on Showers' property was unique as compared to the rest of the city. Showers' basement rupturing was caused by the hydrostatic pressure of almost 118,000 gallons of water sitting in a "bathtub" for about 18 hours. Had Musson satisfied their drainage maintenance duty, hydrostatic pressure

would have been relieved sooner, and the basement rupturing would not have occurred. Never once has Showers argued that Musson should have prevented flooding. The City's mischaracterization of Showers' argument is an attempt to shift the Court's focus on the devastating storm event, and not the contractual obligations Musson had as it related to drainage.

The City has chosen to nit-pick at Shower's phrasing in the Court of Appeals brief in another attempt to distract this Court from the real issues. Showers does not believe there was a ministerial duty to prevent flooding, but to maintain drainage. In its initial brief, Showers did not contend there was a duty to "maintain *proper* drainage", let alone did Showers "heavily rely" on the phrase. Still, there are contractual obligations to maintain "adequate" and "normal" drainage, which can only mean maintaining the same level of drainage as the storm sewer being replaced, in this case, a 2-5 year system. (R. 52, ¶ 7, §§ 105.5.2(2)4.; 107.14(3)). Again, had this been done, the only expert on record believes the flooding on Showers property would not have occurred

CONCLUSION

Both the City and Musson spend significant portions of their briefs advancing negligence arguments that are entirely irrelevant for the purpose

of determining contractor immunity. It remains undisputed that the contract delegated unfettered discretion, and that the DOT never once performed a meaningful review or analysis of Musson's discretionary decisions. For the reasons set forth above and in Showers' initial brief, this Court should reverse the decisions of the Circuit Court of Winnebago County and Court of Appeals, and remand for trial on Showers' claims for negligence.

Respectfully submitted this 16th day of January, 2013.

DEMPSEY LAW FIRM, LLP

Attorneys for Plaintiffs-Appellants-Petitioners

By: s/ Daniel J. Posanski

Daniel J. Posanski

Member No. 1045352

Gerardo Medina Jr.

Member No. 1085890

**CERTIFICATION OF FORM, LENGTH
AND ELECTRONIC COPY**

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8) (b) and (d) for a brief produced with a proportional serif font. The length of this brief is 2,985 words (exclusive of signatures).

I further certify that the electronic copy of this brief is identical to the paper copy and complies with the requirements of Wis. Stat. § 809.19(12).

Dated this 16th day of January, 2013

By s/ Daniel J. Posanski

Daniel J. Posanski
Member No. 1045352
Gerardo Medina Jr.
Member No. 1085890

RECEIVED

01-29-2013

SUPREME COURT OF WISCONSIN
Appeal No. 2011AP001158

**CLERK OF SUPREME COURT
OF WISCONSIN**

SHOWERS APPRAISALS, LLC, REAL MARKETING,
LLC AND MARK W. SHOWERS,

Plaintiffs-Appellants-Petitioners,
v.

MUSSON BROS., INC. AND WEST BEND
MUTUAL INSURANCE COMPANY,

Defendants-Respondents-Cross-Appellants,

LEAGUE OF WISCONSIN MUNICIPALITIES MUTUAL
INSURANCE COMPANY AND CITY OF OSHKOSH,

Defendants-Cross-Respondents.

Appeal from the Circuit Court of Winnebago County
The Honorable Barbara Key, presiding
Circuit Court Case No. 2009CV001438

**AMICUS CURIAE BRIEF
OF THE WISCONSIN ASSOCIATION OF JUSTICE**

WISCONSIN ASSOCIATION FOR JUSTICE
Martha H. Heidt, State Bar No. 1027902

Bye, Goff & Rohde, Ltd.
258 Riverside Drive, BOX 167
River Falls, Wisconsin 54022
Telephone: (715) 425-8161

Amicus Curiae Counsel for the
Wisconsin Association for Justice

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CASES, STATUTES AND OTHER AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
CONCLUSION	14
FORM AND LENGTH CERTIFICATION	
CERTIFICATION OF MAILING	

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

<i>Arsand v. City of Franklin</i> , 83 Wis. 2d 40, 264 N.W.2d 579 (1978).....	3,7
<i>Cook v. Cook</i> , 208 Wis. 2d 166, 560 N.W.2d 246 (1997).....	4
<i>Estate of Lyons v. CNA Ins. Companies</i> , 207 Wis. 2d 446, 558 N.W.2d 658 (Ct. App. 1996).....	passim
<i>Holytz v. Milwaukee</i> , 17 Wis. 2d 26, 115 N.W.2d 618 (1962).....	5,6
<i>Kettner v. Wausau Ins. Companies</i> , 191 Wis. 2d 723, 530 N.W.2d 399 (Ct. App. 1995).....	passim
<i>Lodl v. Progressive N. Ins. Co.</i> , 2002 WI 71, 253 Wis. 2d 323, 646 N.W.2d 314	11
<i>Pamperin v. Trinity Mem.'l Hosp.</i> , 144 Wis. 2d 188, 423 N.W.2d 848 (1988).....	8
<i>Showers Appraisals, LLC v. Musson Bros., Inc.,,</i> 2012 WI App 80, 343 Wis. 2d 623, 819 N.W.2d 316	1,2
<i>Snider v. Northern States Power Co.</i> , 81 Wis. 2d 224, 260 N.W.2d 260 (1977).....	passim
Wis. Stat. § 893.80	passim
Restatement (Second) of Torts § 414, Comment a, at 387 (1965)	passim

INTRODUCTION

This case arises from the June 2008 floods in Oshkosh, Wisconsin. *Showers Appraisals, LLC v. Musson Bros., Inc.*, 2012 WI App 80, ¶1, 343 Wis. 2d 623, 819 N.W.2d 316. Mark Showers and his businesses, Showers Appraisals, LLC, and Real Marketing, LLC (hereinafter referred to collectively as “Showers”), sued private contractor, Musson Bros., Inc. (“Musson”) and the City of Oshkosh for damages suffered in those floods. *Id.* Musson was working for the State of Wisconsin to replace the storm sewer in front of Showers’ building. *Id.* Musson claimed private contractor immunity under *Estate of Lyons v. CNA Ins. Companies*, 207 Wis. 2d 446, 558 N.W.2d 658 (Ct. App. 1996) (“*Lyons*”) for any of his discretionary negligent acts. Affirming the circuit court’s decision granting summary judgment, the Wisconsin Court of Appeals ruled that Musson, whose contract allows it to use whatever “means and methods” it thought appropriate, is immunized under *Lyons* so long as (1) the contract did not afford so much discretion that Musson was acting “as a free agent without direction from the government”; and (2) the Department of Transportation (“DOT”) was regularly on the site and keeping “a close eye” on Musson. *Id.*, ¶¶ 5, 17, 23; *see*

also Id., ¶ 32 (Reilly, J., *dissenting*) (noting that case expands *Lyons* to grant immunity for discretionary acts as to the means and methods of performing government contracts).

The Wisconsin Association for Justice (“WAJ”) supports the position of Plaintiffs-Appellants-Petitioners that the majority erred in concluding that the discretionary acts of government contractors are entitled to immunity under *Lyons*. The circuit court’s decision granting summary judgment should be reversed, and the case should be remanded for trial.

ARGUMENT

The Wisconsin Court of Appeals was wrong in this case because “keeping a close eye” on a private contractor does not constitute sufficient control over the work for purposes of the *Lyons* test. Under *Lyons*, as harmonized with *Kettner v. Wausau Ins. Companies*, 191 Wis. 2d 723, 530 N.W.2d 399 (Ct. App. 1995), immunity will only arise when the government is deemed responsible for the negligent conduct of the private contractor by virtue of the government’s control or right to control such conduct. See *Kettner*, 191 Wis. 2d at 743 (concluding that the term “agent” as used in Wis. Stat. § 893.80 is limited exclusively to those agents who

act as government servants); *see also* *Arsand v. City of Franklin*, 83 Wis. 2d 40, 46, 264 N.W.2d 579 (1978) (vicarious liability arises due to the master's control or right of control over the servant).

According to the *Lyons* court, an independent professional contractor who follows official directives is acting as an "agent" for purposes of Wis. Stat. § 893.80(4), or is entitled to common law immunity when:

- (1) the governmental authority approved reasonably precise specifications;
- (2) the contractor's actions conformed to those specifications; and
- (3) the contractor warned the supervising governmental authority about the possible dangers associated with those specifications that were known to the contractor but not to the governmental officials.

Id. at 457-58. The above *Lyons* test was established as a matter of public policy to "ensure that state and municipal government, and the public at large, is able to make the best use of professional design assistance, but that professional contractors are not unfairly burdened by lawsuits when they follow governmental directives."

Id. at 458.

The *Lyons* court properly ruled that a private contractor must qualify as an "agent" for purpose of immunity Wis. Stat. § 893.80(4).

See *Lyons*, 207 Wis. 2d at 453-54 (focusing inquiry on whether engineer was acting as an “agent” of governmental authorities who had retained ultimate responsibility for the negligent aspects of the bridge design). However, the *Lyons* court failed to expressly harmonize its ruling with *Kettner*, 191 Wis. 2d at 743, a prior decision holding that the term “agent” under Wis. Stat. § 893.80(3) is limited to those governmental “agents” who have a master-servant relationship with a government entity. Consistent with *Kettner*, the *Lyons* court should have clarified that private contractor immunity requires a master-servant relationship with respect to the allegedly negligent conduct. See *Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997) (the court of appeals may not overrule, modify or withdraw language from its prior published decisions).

Wisconsin Stat. § 893.80(3) limits the liability of “any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or agency thereof and . . . their officers, officials, agents or employees for acts done in their official capacity or in the course of their agency or employment.” *Kettner*, 191 Wis. 2d at 732 (*quoting* Wis. § 893.80(3)). Such provision not only limits the liability of the government, but extends

protection to its agents as well. *Id.* at 732-33. Noting that the term “agent” is not defined under Wis. Stat. § 893.80, the *Kettner* court concluded that the term could define either a servant or an independent contractor; accordingly, the meaning of “agent” as used in Wis. Stat. § 893.80 is ambiguous. *Id.* at 734. The *Kettner* court looked to extrinsic aids to determine the meaning intended by the legislature. *Id.*

Although municipalities were historically immune from tort liability in Wisconsin, this Court abolished the concept of governmental immunity in *Holytz v. Milwaukee*, 17 Wis. 2d 26, 36, 115 N.W.2d 618, 623 (1962). *Id.* (citing *Holytz*, 17 Wis. 2d at 36). *Holytz* not only exposed government entities to tort liability for their own conduct, but also permitted liability to be imputed to these entities under the theory of respondeat superior. *Id.* In response to *Holytz*, the legislature enacted what is now Wis. Stat. § 893.80, which adopted the language in *Holytz* and limited liability in suits against governmental subdivisions or “an officer, official, agent or employee” of the government. *Id.*

Holytz used the doctrine of respondeat superior to expose governmental subdivisions to liability for the conduct of their

“officers, agents and employees . . .” *Id.* (quoting *Holytz*, 17 Wis. 2d at 40). However, the doctrine of respondeat superior does not apply to all agents, but only particular kinds of agents who are servants. *Id.* Because the *Holytz* court stated that public bodies would be liable for the torts of their agents under the doctrine of respondeat superior, it was apparent to the *Kettner* court that the *Holytz* court used the word “agent” in the limited context of servants. *Id.* Because the legislature based Wis. Stat. § 893.80, on *Holytz*, and in fact adopted the very language used in that decision, the *Kettner* court concluded that the term “agent,” as used in the statute, is limited exclusively to those agents who act as government servants. *Id.* The reasoning in *Kettner* is sound and should not be overruled to “cloak every person or entity working on behalf of the government with the protection afforded by § 893.80, regardless of the extent and nature of the government’s relationship with the particular person or entity.” *Id.* at 736.

As explained by the *Kettner* court, blanket immunity to all private individuals who qualify as governmental agents would be an absurd result that was not intended by the legislature. *Id.* at 736-37. For example, if a school district engaged a printing company to

print flyers for the school play and the company's truck driver negligently injured an individual while delivering flyers to the school, Wis. Stat. § 893.80(3) would limit the printing company's liability. *Id.* at 737.

Even a broad interpretation of *Lyons* does not go so far as to immunize absolutely all government agents. However, the *Lyons* test is being broadly interpreted in this case to approach such an absurd result. The problem arises because the *Lyons* test is being construed without regard the intention of the legislature with respect to construction of the term "agent."

An agent may be either a servant or an independent contractor, but the doctrine of respondeat superior applies only if the agent is also a servant. *Arsand*, 83 Wis. 2d at 48. The most important distinguishing characteristic between the two forms of agency is the degree to which the principal retains the right to control the details of the work. *Snider v. Northern States Power Co.*, 81 Wis. 2d 224, 232, 260 N.W.2d 260, 263 (1977). Although multiple factors may be considered in determining whether a master-servant relationship exists, "[t]he right to control is the dominant test in determining whether an individual is a servant." *Pamperin v. Trinity*

Mem.'l Hosp., 144 Wis. 2d 188, 199, 423 N.W.2d 848 (1988). If the employer of an independent contractor retains control over the operative detail of doing any part of the work, the employer is vicariously liable for the negligence of the independent contractor under the rules of agency dealing with the relationship between master and servant. Restatement (Second) of Torts § 414, Comment a, at 387 (1965). Properly construed, the *Lyons* test assures that the government retained sufficient control over the operative detail of the part of the work that was allegedly negligent. Under such circumstances, the private contractor qualifies as both an “agent” and a “servant” for purposes of immunity under Wis. Stat. § 893.80.

Under a proper reading of *Lyons*, governmental immunity for private contractors will not apply unless the negligent act of the private contractor was controlled by the governmental authority in the exercise of its governmental discretionary authority. In other words, a private individual is not immunized as an “agent” under *Lyons* unless he is also a “servant” with respect to the operative detail of the work. See Restatement (Second) of Torts § 414, Comment a, at 387 (1965). A person who acts at his or her own discretion is not a “servant,” even if such work was supervised by

the government. *See Snider*, 81 Wis. 2d at 232). In *Lyons*, the government directly controlled the negligent bridge design; accordingly, the engineer would qualify as a “servant” for purposes of the challenged conduct, and *Kettner* can be harmonized with *Lyons*.

The *Lyons* case arises from a fatal accident that occurred due to visibility problems relating to a bridge design approved by the DOT. *Id.* at 448. The bridge had been designed with a low vertical curve that did not conform to safety standards. *Id.* As a result, the distance at which drivers passing over the bridge could first see the stop sign was limited. *Id.* The decision to construct the bridge with the unsafe vertical curve was made by the DOT. *Id.* The DOT approved the short and high design as an exercise of governmental discretion because it had determined that this would save excavation and highway reconstruction costs, and would also provide drivers from the opposite direction with greater visibility. *Id.* Because the DOT had specifically and expressly directed the private contractor to implement negligent short and high design decision, which was made in the exercise of governmental

discretion, the private contractor claimed entitlement to the same governmental immunity as the DOT. *Id.*

The Wisconsin Court of Appeals ruled in *Lyons* that a private contractor following official government directives may be an "agent" for purposes of Wis. Stat. § 893.80(4), i.e., for purposes of governmental immunity. 207 Wis. 2d at 457. However, the *Lyons* court refused to cloak all independent governmental contractors with blanket immunity. *Id.* at 455.

In its analysis, the *Lyons* court recognized that the purpose of discretionary immunity is to insulate legislative policy decisions from judicial examination. *Id.* at 453-54. The court ruled that this purpose supports extending such immunity to private contractors who act at the direction of governmental authorities. *Id.* This public policy consideration would not apply when the private contractor uses its own discretion, and the negligent conduct does not implicate any legislative policy decision.

Under *Lyons*, when a governmental authority makes a negligent discretionary decision and provides "reasonably precise" specifications to a private contractor to carry out or implement such decision, the private contractor is immunized for the governmental

authority's negligent choice. Consistent with the meaning of "agent" as construed in *Kettner*, specifications are "reasonably precise" when they dictate and control the operative detail of the part of the work that was allegedly negligent. In other words, the term "reasonably precise" cannot be considered in a vacuum apart from the allegedly negligent act.

The first step in *Lyons* analysis requires the defendant to identify the action or inaction upon which liability is premised and for which the defendant seeks immunity. As with other situations dealing with governmental immunity, it must be assumed that such conduct was negligent. See *Lodl v. Progressive N. Ins. Co.*, 2002 WI 71, ¶17, 253 Wis. 2d 323, 646 N.W.2d 314 (defense of discretionary act immunity for public officers and employees assumes negligence and focuses on whether the action or inaction upon which liability is premised is entitled to immunity).

Once these steps are accomplished, the next step is to analyze the role of the governmental authority in regard to directing and controlling the action or inaction of the private contractor upon which liability is premised. If the private contractor's conduct, which is assumed to be negligent, was specifically or expressly

directly controlled by the governmental authority in the exercise of its governmental discretion, the three-prong *Lyons* test comes into play.

The “reasonably precise” requirement under *Lyons* addresses whether the specific directive of the governmental authority was “reasonably precise” so that the conduct of the private contractor was, in essence, the decision of the controlling governmental authority. Any specifications or directives of the governmental authority that have no bearing on the conduct upon which liability is premised are immaterial. This is true even if the governmental authority provides hundreds of pages of precise directives. The only directives and specifications material to the *Lyons* test are those specific directives and specifications that relate to the challenged conduct.

As a matter of law, there will be no immunity under *Lyons* when the private contractor, as opposed to the governmental authority, controlled and implemented the means and methods for the construction project. See *Kettner*, 191 Wis. 2d at 743 (construing Wis. Stat. § 893.80 and limiting term “agent” to agents who are also servants). Likewise, when a governmental authority’s role is merely

supervisory, as opposed to directive, the *Lyons* test fails as a matter of law. See *Snider*, 81 Wis. 2d at 232 (servants are distinguished from independent contractors because the principal retains the right to control the work). When a private contractor qualifies an independent contractor, such contractor is not generally an “agent” for purposes of Wis. Stat. § 893.80(3) as construed by the *Kettner* court. To qualify as an “agent” with immunity under *Lyons*, the independent contractor would have to qualify narrowly as a “servant” for purposes of the operative work detail being specifically dictated and controlled by the government. See Restatement (Second) of Torts § 414, Comment a, at 387 (1965).

In this case Musson was supervised by the DOT, but the DOT was not in control of or responsible for Musson’s discretionary decisions. Accordingly, Musson does not qualify for private contractor immunity under *Lyons*.

CONCLUSION

For all the foregoing reasons, WAJ supports the position of Plaintiffs-Appellants-Petitioners that the majority of the Wisconsin Court of Appeals erred in concluding that the discretionary acts of Musson are entitled to immunity under *Lyons*. The circuit court's decision granting summary judgment should be reversed, and the case should be remanded for trial.

Dated: January 29, 2013.

WISCONSIN ASSOCIATION FOR JUSTICE

/s/ Martha H. Heidt
Martha H. Heidt
State Bar No. 1027902
Bye, Goff & Rohde, Ltd.
258 Riverside Drive
P.O. Box 167
River Falls, WI 54022
715-425-8161

AMICUS CURIAE COUNSEL FOR THE
WISCONSIN ASSOCIATION FOR JUSTICE

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c), Stats., for a brief produced with a proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The word count of this brief is 2598 words.

Dated: January 29, 2013.

WISCONSIN ASSOCIATION FOR JUSTICE

/s/ Martha H. Heidt

Martha H. Heidt, State Bar No.: 1027902

Bye, Goff & Rohde, Ltd.

258 Riverside Drive, BOX 167

River Falls, Wisconsin 54022

Telephone: (715) 425-8161

Amicus Curiae Counsel for the
Wisconsin Association for Justice

CERTIFICATION OF MAILING

I certify that this brief sent to the Clerk of the Supreme Court and Court of Appeals by U.S. Mail on January 29, 2013. I further certify that the brief was correctly addressed and postage was prepaid.

Dated: January 29, 2013.

WISCONSIN ASSOCIATION FOR JUSTICE

/s/ Martha H. Heidt

Martha H. Heidt, State Bar No.: 1027902

Bye, Goff & Rohde, Ltd.

258 Riverside Drive, BOX 167

River Falls, Wisconsin 54022

Telephone: (715) 425-8161

Amicus Curiae Counsel for the
Wisconsin Association for Justice