**COURT OF APPEALS DECISION DATED AND FILED**

**January 20, 2010**

**David R. Schanker**
**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. 2009AP21**

**Cir. Ct. No. 2007CV56**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS**
**DISTRICT III**

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**WILLIAM GLAUM AND MARTHA GLAUM,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**CITY OF HAYWARD,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Sawyer County: NORMAN L. YACKEL, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. William and Martha Glaum appeal a summary judgment dismissing tort claims against the City of Hayward arising out of allegations of runoff and flooding on the Glaums' property due to the City's road enlargement and storm sewer work. The Glaums insist the circuit court erred by

concluding their claims were barred by governmental immunity. We reject the Glaums' arguments and affirm.

¶2 In August 2004, the City widened Johnson Road, repaved the blacktop, lowered the storm sewer, and placed a curb and gutter opposite the Glaums' property. Before the City's work, the Glaums had some pooling of water along the southern edge of their driveway. Subsequent to the work, the Glaums have experienced water drainage and flooding in their driveway.[1]

¶3 The Glaums commenced an action in negligence and nuisance against the City. The City moved for summary judgment, arguing entitlement to immunity pursuant to WIS. STAT. § 893.80(4).[2] The Glaums responded WIS. ADMIN. CODE § Comm 82.36(9) (Feb. 2009) created a ministerial duty to design all exterior storm water inlets for the anticipated flow. The Glaums also asserted discretionary immunity did not bar claims against the City for nuisances. The circuit court granted the motion for summary judgment and this appeal follows.

¶4 Public officers or employees, as well as their employing entities, enjoy immunity from liability from the performance of any discretionary act within the scope of their governmental employment. ***Kierstyn v. Racine Unified Sch. Dist.***, 228 Wis. 2d 81, 88, 596 N.W.2d 517 (1999). Immunity does not apply if the act or omission on which a claim for liability is predicated is ministerial rather than discretionary. ***Kimps v. Hill***, 200 Wis. 2d 1, 10, 546 N.W.2d 151 (1996). A duty is ministerial only when it is "absolute, certain and imperative,

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[1] According to various experts, this problem could be corrected by the Glaums raising the height of their driveway.

[2] References to Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

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). Stated another way, there is no liability if the act or omission results from an "exercise of judgment." ***Willow Creek Ranch, L.L.C. v. Town of Shelby***, 2000 WI 56, ¶25, 235 Wis. 2d 409, 425, 611 N.W.2d 693.

¶5 At the circuit court, the Glaums argued immunity did not bar their causes of action because installation of the storm sewer and gutter violated a ministerial duty set forth in WIS. ADMIN. CODE § Comm 82.36(9) (Feb. 2009).[3] In their brief opposing summary judgment, the Glaums stated:

> Wisconsin Administrative Code § Comm[] 82.36(9) [Feb. 2009] states that "[a]ll exterior stormwater inlets shall be designed for the anticipated flow." It is a ministerial duty for [the City] to comply with the Wisconsin Administrative Code, and in this instance [the City] did not. *See* ***DeFever v. City of Waukesha***, [2007 WI App 266,] 306 Wis. 2d 766, 743 N.W.2d 848[]. [The City] installed a curb and gutter on the curve in the road *opposite* of [the Glaums'] property. Clearly, storm water will follow the curve of the curb, and once the storm gutter is filled with gravel or overflowing with water then the only reasonable anticipated direction for the water to travel is where the curb guides the water's angular velocity. The anticipated flow, therefore, of storm water is directly toward [the Glaums'] property and [the City] has failed its ministerial

[3] The City argues in its response brief that the Glaums cite for the first time on appeal WIS. ADMIN. CODE § Comm 82.10(1)(d) (Feb. 2009), as another basis for the imposition of a ministerial duty. Generally, we do not address issues raised for the first time on appeal. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980). The Glaums do not attempt to refute in their reply brief the contention that they raised the issue for the first time on appeal, and the issue is therefore deemed conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). We therefore will not address the issue further.

> duty of complying with the Administrative Code in anticipating the direction that the water will flow.

¶6 Our supreme court clarified the law concerning governmental immunity in ***Milwaukee Metropolitan Sewerage District v. City of Milwaukee***, 2005 WI 8, ¶61, 277 Wis. 2d 635, 691 N.W.2d 658. In that case, the court emphasized that approval of the design and construction of a public work are generally discretionary acts. ***Id.***, ¶60.[4] The court stated:

> Even if the system is poorly designed, a municipal government is immune for this discretionary act. Therefore, the City is immune from suit relating to its decisions concerning the adoption of the waterworks system, the selection of the specific type of pipe, the placement of the pipe in the ground, and the continued existence of such pipe. These are discretionary legislative decisions.

***Id.***

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[4] Cases relied upon by the Glaums were among those expressly noted by the court in ***Milwaukee Metropolitan Sewerage District v. City of Milwaukee***, 2005 WI 8, ¶59, n.17, 277 Wis. 2d 635, 691 N.W.2d 65, as "utilizing conflicting rationales to reach results that are not entirely consistent." The court indicated the confusion was the result of three factors:

> First, some decisions have continued to rely on immunity jurisprudence that predated ***Holytz*** [***v. City of Milwaukee***, 17 Wis. 2d 26, 115 N.W.2d 618 (1962)] and [WIS. STAT.] § 893.80(4). *See*, *e.g.*, ***Hillcrest*** [***Golf & Country Club v. City of Altoona***], 135 Wis. 2d [431], 438-41, [400 N.W.2d 493 (Ct. App. 1986)]. Second, some decisions employ separate analyses for negligence and nuisances grounded in negligence. *See*, *e.g.*, ***Welch v. City of Appleton***, 2003 WI App 133, ¶¶8-13, 265 Wis. 2d 688, 666 N.W.2d 511. Third, some decisions fail to stress that a municipality is liable for its negligent acts only if those acts are performed pursuant to a ministerial duty. *See, e.g.*, ***Anhalt*** [***v. Cities & Vills. Mut. Ins. Co.***, 2001 WI App 271, ¶26], 249 Wis. 2d 62, [637 N.W.2d 422].

***Id.***

¶7 Here, the Glaums have failed to demonstrate the design of exterior storm water inlets was outside the ambit of the discretion discussed in ***Milwaukee Metropolitan Sewerage District***. Significantly, WIS. ADMIN. CODE § Comm 82.36(9) does not specify how anticipated flow is to be determined or what specific engineering is to be undertaken to accommodate anticipated flow. This is distinguishable from ***DeFever***, where the administrative code specifically required pipe to be buried at least five to seven feet underground. ***DeFever***, 306 Wis. 2d 766, ¶11. The code imposed a ministerial duty in that case because it "prescribed … an acceptable range, at which installation was to be performed." ***Id.***

¶8 Conversely, the Glaums have not shown an absolute, certain and imperative duty, prescribing the performance of a task with such certainty that nothing remains for judgment or discretion. *See* ***Lister***, 72 Wis. 2d at 301. The administrative code in the present case prescribed a nonspecific duty, leaving the municipality with the discretion to design each particular project. The duty the Glaums alleged was therefore not ministerial. The circuit court correctly granted summary judgment.[5]

[5] We need not separately analyze the immunity question for both negligence and nuisance because liability for the nuisance cannot be established without proof of negligence. ***Milwaukee Metro. Sewerage Dist.***, 277 Wis. 2d 635, ¶59.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.