COURT OF APPEALS
DECISION
DATED AND FILED

October 6, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2570 **Cir. Ct. No. 2009CV636**

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

SCOTT NEUENDORF AND DANETTE NEUENDORF,

PLAINTIFFS-APPELLANTS,

V.

CITY OF WEST BEND,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Washington County: JAMES K. MUEHLBAUER, Judge. *Affirmed*.

Before Lundsten, P.J., Vergeront and Blanchard, JJ.

¶1 LUNDSTEN, P.J. This action stems from the City of West Bend's discovery that sanitary waste was discharging into the City's storm water main, instead of its sanitary main. The source of this discharge was the plumbing connected to the residence of Scott and Danette Neuendorf. An investigation

revealed that a private plumber had connected the Neuendorfs' sanitary pipe to the wrong main when the plumbing was first installed. The Neuendorfs sued the City to recover the costs associated with correcting the hookup, alleging that the City's plumbing inspector had negligently failed to discover the incorrect hookup. The City moved for summary judgment, arguing that it was immune from suit. Based on immunity, the circuit court granted summary judgment in the City's favor.

¶2 On appeal, the Neuendorfs assert that the circuit court erred because two exceptions to immunity apply—the "ministerial duty" exception and the "known danger" exception. We are not persuaded that either exception applies and, accordingly, affirm the circuit court.

Background

¶3 In 1999, the Neuendorfs hired a general contractor to build a residence in the City of West Bend. The general contractor hired a plumbing subcontractor. Part of the plumbing subcontractor's job was to install a pipe to carry away sanitary waste. The pipe, referred to as a "lateral," was to run underground from the Neuendorfs' residence and connect to the City's sanitary main located in the middle of the adjacent street.

¶4 The subcontractor installed the lateral and requested an inspection. When the City's inspector arrived, the part of the lateral connecting to a public main was buried by gravel and was not visible. Only a small portion of the lateral was left exposed to allow the inspector to perform a test to ensure that the lateral did not leak. The lateral passed the leakage test, and there is no dispute that this test was properly performed. The inspector did not ask to have the lateral's connection to the public main uncovered, or otherwise try to determine whether the lateral was connected to the correct main.

¶5 In 2008, the City became aware of sanitary waste being discharged into the storm water main and, after testing, discovered that the Neuendorfs' residence was the source. The Neuendorfs' sanitary lateral was connected to the City's storm water main. The City informed the Neuendorfs that the Neuendorfs were responsible for correcting the error at their own expense.

¶6 The Neuendorfs sued the City for negligence based on the City plumbing inspector having improperly inspected the lateral in 1999, and sought damages related to making the correction to the connection. The Neuendorfs did not sue the plumber. The plumber went out of business and, we gather, was judgment proof at the time the plumbing error came to light. In any event, this case involves only the Neuendorfs' claim against the City.

¶7 In its answer, the City asserted as an affirmative defense that it was immune from suit, and sought summary judgment based on immunity. The circuit court agreed that the City was immune, and granted summary judgment in favor of the City. The Neuendorfs appeal.

Discussion

¶8 The circuit court granted summary judgment in favor of the City based on immunity. A party is entitled to summary judgment when there are no disputed issues of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).[1] The issues in this appeal concern questions of law,

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

which we review *de novo*. *See* ***United Rentals, Inc. v. City of Madison***, 2007 WI App 131, ¶11, 302 Wis. 2d 245, 733 N.W.2d 322.

¶9 The parties agree that the immunity found in WIS. STAT. § 893.80(4) controls the issues in this appeal. Our supreme court has described the applicable framework as follows:

> Under WIS. STAT. § 893.80(4), a municipality is immune from "any suit" for "acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions." These functions are synonymous with discretionary acts. A discretionary act involves the exercise of judgment in the application of a rule to specific facts.
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> This court has recognized four exceptions to governmental immunity under WIS. STAT. § 893.80(4). In ***Kierstyn v. Racine Unified Sch. Dist.***, 228 Wis. 2d 81, 90-97, 596 N.W.2d 417 (1999), we noted that immunity does not apply to the performance of: (1) ministerial duties; (2) duties to address a "known danger;" (3) actions involving medical discretion (the ***Scarpaci*** rule); and (4) actions that are "malicious, willful, and intentional."

Willow Creek Ranch, L.L.C. v. Town of Shelby, 2000 WI 56, ¶¶25-26, 235 Wis. 2d 409, 611 N.W.2d 693 (some citations omitted). The issues here concern the "ministerial duties" and "known danger" exceptions.

A. Ministerial Duty

¶10 The Neuendorfs' "ministerial duties" argument turns on whether, based on plumbing code regulations,[2] the inspector had an "'absolute, certain and

[2] The parties' arguments are based on a more recent version of the Wisconsin Administrative Code and not the code in force when the inspection here took place in 1999. We address the version of the plumbing code in force at the time of the inspection, and treat the parties' arguments as if they referred to the correct version of the code. To the extent the parties rely on language that appears only in later versions of the code, we do not address that language. (continued)

imperative'" duty to determine if the Neuendorfs' sanitary lateral was connected to the City's sanitary main. *See* ***id.***, ¶27 (citation omitted). As we explain, we do not find such a duty in the regulations that the Neuendorfs rely on.

¶11 The supreme court has defined a "ministerial act" as follows:

> A ministerial act, in contrast to an immune discretionary act, involves a duty that "is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion."

Id. (citation omitted).

¶12 The Neuendorfs do not argue that the regulations directly state a requirement that an inspector must verify that sanitary laterals are connected to sanitary mains. Rather, the Neuendorfs argue that such a requirement necessarily follows from the general proposition that an inspector is required to inspect for compliance with *all* code provisions. In other words, the Neuendorfs argue:

- The inspection code provisions require that inspectors inspect for compliance with code requirements.
- Certain plumbing code provisions require that plumbers connect the sanitary lateral to the sanitary main.
- It follows that inspectors must always inspect every aspect necessary to verify complete code compliance and, in particular, must inspect to verify the sanitary lateral/sanitary main connection.

For example, the Neuendorfs cite inspection language in WIS. ADMIN. CODE § Comm 82.01. However, the relevant version of § Comm 82.01 does not contain the inspection language.

¶13 The City does not dispute the first two points—that, generally speaking, when an inspector inspects, it is for compliance with the code and that, pursuant to the code, plumbers must connect the sanitary lateral to the sanitary main. The City, however, disputes the proposition that its inspectors must verify that there is complete code compliance in every respect. More specifically, the City contends that there is no requirement that its inspectors must verify the sanitary lateral's connection. We agree with the City.

¶14 The Neuendorfs focus their argument on WIS. ADMIN. CODE § Comm 82.21(1) (Apr. 1998), which appears in the code chapter on plumbing and which is titled "Testing of Plumbing Systems." In particular, the Neuendorfs assert that the relevant ministerial duty is found in § Comm 82.21(1)(b), which states, in relevant part:

> (b) *Local inspection.* Where the plumbing is installed in a municipality having a local inspector, the testing of the plumbing shall be done in the presence of a plumbing inspector, except as provided in subd. 1.b.
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> 1. Notice of inspection.…
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> ....
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> 2. Preparations for inspection. When the installation is ready for inspection, *the plumber shall make such arrangements as will enable the plumbing inspector to inspect all parts of the plumbing system.* The plumber shall have present the proper apparatus and appliances for making the tests, and shall furnish such assistance as may be necessary in making the inspection.
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> 3. Rough-in inspection. *A rough-in inspection shall be made when the plumbing system is roughed-in and before fixtures are set.* Except as provided in subd. 1., plumbing work shall not be closed in, concealed, or covered until it has been inspected and approved by the plumbing inspector and permission is granted to do so.

> 4. Final inspection. a. Upon completion of the plumbing installation and *before final approval is given, the plumbing inspector shall inspect the work.*

(Emphasis added.)

¶15 The Neuendorfs point out that, in these provisions, the mandatory language "shall" is used. But much of this mandatory language is directed at plumbers, not inspectors. For example, the only mandatory language purporting to comprehensively address plumbing components is directed at plumbers. In the "[p]reparations for inspection" subsection, plumbers are told that "*the plumber shall* make such arrangements as will enable the plumbing inspector to inspect all parts of the plumbing system." WIS. ADMIN. CODE § Comm 82.21(1)(b)2. (emphasis added). On its face, this is not a requirement that *the inspector shall inspect* "all parts" of the plumbing system. Rather, this language is consistent with an inspector having discretion over which parts to inspect, whereas a plumber is required to provide access to "all parts" to "enable" the inspector to exercise his or her discretion. *See* ***id.***; *see also* § Comm 82.21(1)(b)3. (directing that plumbers "shall not" cover up work before it is inspected).

¶16 Turning to the language arguably directed at the inspector, we find no language requiring the inspector to inspect the lateral's connection. The "rough-in" provision merely states that "[a] rough-in inspection shall be made when the plumbing system is roughed-in and before fixtures are set." WIS. ADMIN. CODE § Comm 82.21(1)(b)3. In a similarly undefined way, the "final inspection" provision requires that, "before final approval is given, the plumbing inspector shall inspect the work." WIS. ADMIN. CODE § Comm 82.21(1)(b)4. These provisions do not specifically require the inspector to inspect the sanitary lateral's connection to the sanitary main. And, these provisions do not state that

the inspector is required to inspect all parts of the plumbing for compliance with every code provision.

¶17 To the extent that WIS. ADMIN. CODE § Comm 82.21(1) requires "testing," it is undisputed that here the required testing was done. Specifically, § Comm 82.21(1)(b) states: "Where the plumbing is installed in a municipality having a local inspector, *the testing* of the plumbing shall be done in the presence of a plumbing inspector ...." (Emphasis added.) A subsequent subsection then provides the specific test applicable to the sanitary lateral: "A sanitary building sewer … shall be tested for leaks and defects with water or air before or after being covered in accordance with either subd. 2.a. or b." WIS. ADMIN. CODE § Comm 82.21(1)(d)2. The referenced air test option states, in part: "The air test shall be made by attaching an air compressor testing apparatus to any suitable opening, and, after closing all other inlets and outlets to the system, forcing air into the system until there is a uniform gauge pressure of 3 pounds per square inch." WIS. ADMIN. CODE § Comm 82.21(1)(d)2.b.

¶18 The Neuendorfs acknowledge that the inspector properly performed the air test and that such testing would not have revealed that the sanitary lateral's connection was to the wrong main. Notably, the code specifically sets out this testing requirement, a requirement that would seem superfluous if inspectors were required to verify complete compliance with the entire plumbing code. That is, there would be no need to specifically require testing for compliance with the code's requirement that laterals not leak if there was already a general ministerial duty to verify such compliance.[3] Also, this testing requirement stands in contrast

[3] We acknowledge that we find no explicit "no leak" code requirement, but such a requirement is necessarily inferred. The Neuendorfs could not seriously argue otherwise. This is (continued)

to the undefined "rough-in" and "final inspection" provisions on which the Neuendorfs primarily base their inspection-duty argument. As to these provisions, as we have seen, there is no similar defined testing or inspection mandate.

¶19 Thus, we disagree with the Neuendorfs that WIS. ADMIN. CODE § Comm 82.21(1)(b) contains a ministerial duty to verify the sanitary lateral/sanitary main connection.[4]

¶20 Finally, we observe that, in the course of their argument, the Neuendorfs assert that "Wisconsin appellate courts have recognized the ministerial duties exception to governmental immunity in cases involving building codes and plumbing codes," and the Neuendorfs then cite cases in support of this general proposition.[5] The cited cases, however, fall short of imposing an across-the-board

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especially true considering that their own argument supposes that there is an implied sanitary lateral/sanitary main connection code requirement. The Neuendorfs do not point to a specific code requirement, but instead rely on WIS. ADMIN. CODE § Comm 82.30(11)(f), which sets out the technical procedures for connecting "building sewers to public sewers."

[4] WISCONSIN ADMIN. CODE § Comm 82.21(1) cross-references code provisions pertaining to inspections for one- and two-family dwellings. *See* § Comm 82.21(1)(c) (this section cross-references, among other provisions, WIS. ADMIN. CODE § ILHR 20.10 (Mar. 1998). Section ILHR 20.10 was subsequently codified as WIS. ADMIN. CODE § Comm 20.10 (Jan. 1999), but this change did not affect the pertinent dwelling-inspection language). The Neuendorfs cite some of these cross-referenced provisions, but they do not separately discuss the provisions' significance. *See* § ILHR 20.10(1) (inspections shall be conducted "to ascertain whether or not the construction or installations conform to … the provisions of this code"); § ILHR 20.10(1)(b)2.c. ("rough plumbing" inspection requirement); § ILHR 20.10(1)(b)4. (stating a final inspection requirement to address code violations affecting "the health and safety of the occupant"). Accordingly, we do not separately address these provisions.

[5] *See* ***Coffey v. City of Milwaukee***, 74 Wis. 2d 526, 531, 247 N.W.2d 132 (1976) (addressing negligent safety inspections of a building's "standpipes" and "accept[ing] as true" for purposes of that opinion that "the building inspector … was obligated to inspect the standpipes … and that he actually undertook to inspect such standpipes periodically for safety purposes"); ***DeFever v. City of Waukesha***, 2007 WI App 266, ¶¶5, 9-11, 306 Wis. 2d 766, 743 N.W.2d 848 (addressing ministerial duty to follow depth requirements where a municipality had a role in "the design and installation" of a public water main); ***Hawes v. Germantown Mut. Ins. Co.***, 103 Wis. 2d 524, 538-39, 309 N.W.2d 356 (Ct. App. 1981) (not addressing ministerial duties and (continued)

exception for inspections. With the exception of the case we discuss next, we do not understand the Neuendorfs to be asserting that such cases control the facts before us.

¶21 The Neuendorfs apparently contend that ***Wood v. Milin***, 134 Wis. 2d 279, 397 N.W.2d 479 (1986), is controlling here. However, they fail to meaningfully develop the argument. The Neuendorfs merely assert that "[a]s in ***Wood***, [the inspector here] failed to conduct rough and final plumbing inspections, which were clearly required by the code." ***Wood***, however, does not purport to address the ministerial duties topic, or otherwise define an inspector's required duties as a matter of law. The focus of ***Wood*** is on entirely different legal issues. *See* ***id.*** at 282-90 (concluding that a statutory damages cap allowed joint tenants to each collect the capped amount, and that building inspectors may not escape liability based on the concept of "public duty").[6]

¶22 In sum, we conclude that the Neuendorfs point to no "'absolute, certain and imperative'" requirement mandating inspection of the sanitary lateral's connection. *See* ***Willow Creek Ranch***, 235 Wis. 2d 409, ¶27 (citation omitted).

¶23 Before moving on, we note that the Neuendorfs also assert that the inspector had a ministerial duty to inspect for the *depth* of the sanitary lateral. The Neuendorfs' premise here is that *sanitary* laterals and mains are generally required

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immunity, but rather addressing whether other public policy factors bar liability where liability "arises out of improper application of a building code").

[6] The Neuendorfs note that, in ***Wood v. Milin***, 134 Wis. 2d 279, 397 N.W.2d 479 (1986), the inspector "failed to conduct a final building and plumbing inspection as was required by the building code." This and related information appears in ***Wood*** as background facts and, as we have explained, ***Wood***'s legal discussion does not include a discussion of the required scope of inspections. *See* ***id.*** at 281.

by the code to be at different depths than *storm water* laterals and mains, and that, if the inspector had inspected for depth, he necessarily would have discovered that the connection was incorrect. This argument, however, adds nothing. The Neuendorfs do not point to a specific mandate that the inspector check the lateral's depth.

B. Known Danger

¶24 The Neuendorfs argue that the "known danger" immunity exception applies because "the health and safety threat resulting from an improper hookup of a sanitary sewer lateral to a City storm sewer main is a known danger." We are not persuaded.

¶25 The supreme court has described the "known danger" exception as follows:

> [A] dangerous situation will be held to give rise to a ministerial duty only when "there exists a known present danger of such force that the time, mode and occasion for performance is evident with such certainty that nothing remains for the exercise of judgment and discretion."
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> … [T]he ministerial duty arises not by operation of law, regulation or government policy, but by virtue of particularly hazardous circumstances—circumstances that are both known to the municipality or its officers and sufficiently dangerous to require an explicit, non-discretionary municipal response. If liability is premised upon the negligent performance (or non-performance) of a ministerial duty that arises by virtue of a known and compelling danger, then immunity will not apply.

Lodl v. Progressive N. Ins. Co., 2002 WI 71, ¶¶38-39, 253 Wis. 2d 323, 646 N.W.2d 314 (citation and footnote omitted).

¶26 The City argues that the Neuendorfs have forfeited their "known danger" argument. In response, the Neuendorfs essentially concede that they raise the issue for the first time on appeal. Nonetheless, the Neuendorfs rely on the dissenting opinion in ***Lodl***, where it was asserted that, at least in some sense, the ministerial duty and known danger exceptions have been collapsed into a single exception. *See* ***id.***, ¶61 (Bradley, J., dissenting) ("The majority rejects the distinction between the two exceptions and collapses the known danger exception into the ministerial duty exception."). This response by the Neuendorfs is self-defeating. If the Neuendorfs mean to argue that they did not need to preserve a distinct argument before the circuit court because there is no distinct argument, then it would seem we have nothing more to address. But if the Neuendorfs believe, as they plainly do, that there is a distinct "known danger" argument to be made, then their reliance on the ***Lodl*** dissent does not address their failure to raise the distinct issue.

¶27 In any event, we agree with the City that the Neuendorfs have forfeited their known danger argument, and we reject it on that basis. *See* ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838 (generally, issues not presented to the trial court will not be considered for the first time on appeal).

¶28 Further, even if we did address the Neuendorfs' argument, it would fail because it lacks necessary development. For example, the case that the Neuendorfs rely on, ***Lodl***, describes the exception as requiring "particularly hazardous circumstances … that are … *known* to the municipality." *See* ***Lodl***, 253 Wis. 2d 323, ¶39 (emphasis added). Given this description, the Neuendorfs do not explain why the exception is relevant here, where, by all accounts, the inspector *did not know* that the sanitary lateral was incorrectly attached. For that matter, the

Neuendorfs do not, as the City points out, demonstrate that the incorrect connection constituted a "compelling," "severe," and "immediate" danger. *See, e.g.*, ***id.*** (requiring a "compelling" danger); ***Umansky v. ABC Ins. Co.***, 2009 WI 82, ¶14 n.7, 319 Wis. 2d 622, 769 N.W.2d 1 ("The known danger exception 'has been reserved for situations that are more than unsafe, where the danger is so severe and so immediate' that a response is demanded." (citation omitted)).[7]

Conclusion

¶29 For the reasons discussed, we affirm the circuit court's granting of summary judgment in favor of the City.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

[7] Given our conclusions in the above text, we do not reach the City's alternative reason to affirm based on the application of six public policy factors that may preclude liability.