

Municipal Immunity for Discretionary Acts Survives – For Now

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The League of Wisconsin Municipalities participated as *amicus curiae* in *Pinter v. Village of Stetsonville*,¹ an important case concerning municipal immunity before the Wisconsin Supreme Court. Wisconsin Statute § 893.80(4) prohibits suits from being brought against municipalities or their officials, agents or employees for “acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.” Wisconsin courts have long interpreted that language as providing municipalities with immunity for *discretionary* acts. The good news? That longstanding interpretation survives – for now.

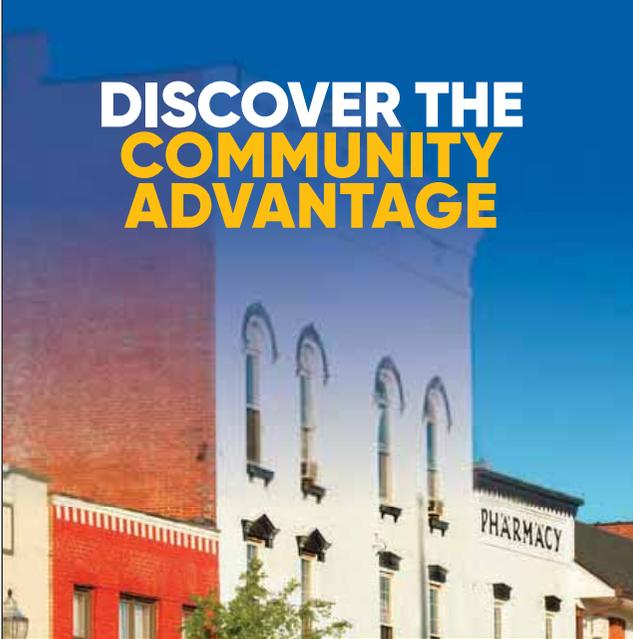
Alan Pinter sued the Village of Stetsonville (Village) for negligence and private nuisance after wastewater backed up into his basement following a period of heavy rain. Pinter claimed the Village knew wastewater would back up into his basement if the wastewater in the Village’s system exceeded a certain level, and that employees operating the system had a ministerial duty, based on a former village employee’s orally relayed guideline, to bypass the system and pump the wastewater into a ditch when that level was reached. Additionally, Pinter claimed the Village’s negligent maintenance of its sewer system allowed

water from outside sources to infiltrate and overwhelm the system, causing the backup in his basement; however, he presented no expert testimony supporting that claim. At issue in the case was (1) whether the Village had a ministerial duty to follow the former village employee’s oral guideline regarding when to pump wastewater out of the lift station; and (2) whether expert testimony was necessary to prove legal causation.

The Court held the former village employee’s guideline regarding when to pump wastewater out of a village lift station did *not* rise to the level of

1. *Pinter v. Village of Stetsonville*, 2019 WI 74.

► p.20



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a ministerial duty because it was not “absolute, certain and imperative,” and was not adopted by any lawmaking body. The Court noted that Department of Natural Resource (DNR) regulations underscore the discretionary nature of deciding when to bypass a treatment system. The applicable regulations prohibit pumping untreated water into a public waterway unless the bypass is unavoidable to prevent loss of life, personal injury, or severe property damage; there are no feasible alternatives to the bypass; and the municipality reports the bypass to the DNR. In deciding whether to bypass, Village staff considers a number of variables including whether the water is still rising, whether it is still raining, and the viability of using a pump truck. Accordingly, the Village was immune from liability for the sewage backup because the village staff’s decision to first haul wastewater by truck from its overwhelmed facility before directly pumping it into a nearby ditch was discretionary. The Court also held that expert testimony was necessary to determine whether the village’s wastewater system was the legal cause of the sewage backup because the “nuances and complexities of storm water infiltration into the municipal sewer system ... are outside the realm of ordinary experience and lay comprehension.” *Pinter*, ¶66.

Although the Court’s decision was favorable for municipalities, it was a close decision. Four justices agreed the village was immune from liability under Wis. Stat. § 893.80(4) for a discretionary act. Three justices dissented. Justice Dallett, joined by Justices Kelly and R. Bradley, dissented criticizing the majority for “continu[ing] to apply a framework for governmental immunity that creates an artificial, impracticable distinction between a ministerial duty and discretionary act.” The dissent said village employees were not “making any laws or exercising any judgments related to government business” or “making balanced policy decisions for wastewater management on behalf of the Village for which the protection of immunity was intended.” The dissent also said the need for expert testimony should be evaluated on a case-by-case basis and that “water infiltration, wastewater disposal system overflows, seepage of wastewater into homes, and related issues are all within the capability of jurors to understand and do not require any specialized knowledge or experience.” *Id.*, ¶¶ 72, 78, and 86.

If one additional justice joins the dissenters, the group will go from minority to majority on the issue of discretionary immunity. After serving on the Wisconsin Supreme Court for 43 years, Justice Shirley Abrahamson recently

departed the bench. It is unclear where newly elected Justice Brian Hagedorn will fall on this issue but if he agrees with the dissenting justices in *Pinter*, then we are likely to see a significant narrowing of municipal immunity when the Court next considers a case involving interpretation of § 893.80(4).

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About the Author:

Claire Silverman is Legal Counsel for the League of Wisconsin Municipalities. Claire’s responsibilities include supervising the legal services provided by the League, answering questions of a general nature for officials and employees of member municipalities, writing legal articles for the League’s magazine and amicus briefs in appellate cases involving issues of statewide concern to municipalities, organizing an annual institute for municipal attorneys, and educating local officials on a variety of topics pertaining to their duties. Claire joined the League staff in 1992. Contact Claire at cms@lwm-info.org



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