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CROSSING THE LINE WITH CROSS CONNECTION ORDINANCES

By Susan S. Tice

Under the Safe Drinking Water Act of 1974, the Federal Government has established, through the EPA (Environmental Protection Agency), national standards for safe drinking water. The States are responsible for the enforcement of these standards, the supervision of public water supply systems and the sources of drinking water. The water supplier—many times the local governmental entity—is held responsible for compliance with the provisions of the Safe Drinking Water Act, which includes a warranty that water quality provided by its operation is in conformance with the EPA standards at the source and delivered to the customer without the quality being compromised.

Public health officials have long been concerned about cross connections in plumbing systems and in public drinking water supply distribution systems. Cross connections are the links through which it is possible for contaminating materials to enter a potable water supply.

Sump pumps are designed to capture surface or ground water that enters basements or crawl spaces and pump it away from the house. Homeowners commonly use sump pumps in their basements to battle moisture and flooding issues. However, water from sump pumps should NOT be discharged into the sanitary sewer system. That is called cross connection. Water that goes down any drain in a house leads to the sanitary sewer system and eventually ends up at a wastewater treatment plant, where it is treated before being released back into the environment.

Sump pump water, often called "clear water," is most often rain water, ground water, or snow melt which flows directly into area streams, ponds, and lakes. Water from sinks, showers, tubs, toilets, and washing machines is wastewater and must be treated before it is discharged into the environment.

Clear water from a sump pump overloads the sanitary sewer system. Since sanitary sewer rates are based on the number of gallons that flow through a sanitary sewer collection system and into a water treatment system, treating clear water is costly.

The successful promotion of a cross connection control program in a municipality is dependent upon legal authority to conduct such a program. Where a community has adopted a modern plumbing code, such as the National Plumbing Code, ASA A40.8 – 1955, or subsequent revisions, provisions of the code will govern cross connections. It then remains to provide an ordinance that will establish a program of inspection for elimination of cross connections.

Many local governmental entities with sanitary sewer systems are considering enacting ordinances that address the situation where a homeowner has cross connected their sump pump discharge pipe with the municipal sanitary sewer system.

Generally, the enactment of such an ordinance requires that property owners allow their property to be inspected for possible cross connections. Such administrative inspections bring into play the U.S. and Minnesota constitutional provisions protecting homeowners from unlawful warrantless searches of their residence. *Camara v. Municipal Court,* 387 U.S. 523 (1967). Property owners have brought actions pursuant to 42 U.S.C. § 1983 against cites alleging violation of the 4th and 14th Amendments and challenging the constitutionality of an ordinance requiring inspections of properties to determine if they had sump pumps (or other devices) making prohibited discharges into the City's sanitary sewer system.

Often times, the ordinance carries a penalty for failure to permit a search, including imposition of surcharges assessed to the water/sewer bill of the homeowner. Such provisions, however, violate the Constitution. Instead, case law suggests that a City may alternatively provide in its cross connection ordinance:

1. That the City has the right to obtain an administrative search warrant where residents fail to permit or otherwise refuse an inspection; and/or

2. That a resident may submit certification from a licensed plumber that:
   (a) Identifies whether there is a sump pump;
   (b) If there is a sump pump system, whether sump system is cross-connected to the sanitary system; and
   (c) If it is connected to the sanitary sewer system, the illegal connection has been rectified.

See, *Plisner v. City of Little Canada*, 2007 WL 474964 (D. Minn. Feb. 9, 2007); *Yankee v. City of Delano*, 171 F. App'x 532 (8th Cir. 2006) (per curiam). •

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IMMUNITY UPDATE

By Jessica E. Schwie

The State of Minnesota, counties, towns, municipalities and schools are immune from (entitled to dismissal of) various types of tort claims. Minnesota statute sections 3.736 and 466.03 provide an itemized list of claims from which governmental entities are immune. In addition, case law recognizes several immunity defenses not otherwise provided for in the statutes. In those cases where a governmental entity is not immune from a claim, it may still be protected by a cap or limit on the amount of tort damages awarded.

The rationale for protecting governmental entities is generally based upon the following concepts: (1) governmental entities are charged with making decisions for the public good that involve the weighing of multiple factors that often have both negative and positive outcomes, (2) the judicial branch, through the medium of lawsuits, should not second guess the political balancing decisions of governmental entities, (3) an award obtained against a governmental entity is paid out of public funds which are funded by the taxpayer, (4) public funds are better protected, and it is a better use of public funds, if a few individuals suffer as opposed to the public in general, and (5) governmental agents will perform their duties more effectively if not hampered by fear of tort liability. *Nusbaum v. Blue Earth County*, 422 N.W.2d 713, 718 (Minn. 1988); *Holmquist v. State*, 425 N.W.2d 230, 231 (Minn. 1988); *Wilson v. Ramacher*, 352 N.W.2d 389, 393 (Minn. 1984); *see generally*, Restatement (Second) Torts § 895B. The most often used immunity defenses are statutory discretionary immunity (referred to by the court as governmental immunity), common law official immunity, and recreational immunity.

In order to be entitled to statutory discretionary immunity, the governmental entity must demonstrate that the challenged act or omission arose out of a "planning-level" (also known as "policy-making") decision. *Zank v. Larson*, 552 N.W.2d 719 (Minn. 1996). Planning-level or policy-making decisions are those decisions that involve the balancing of public policy objectives, including social, economic, financial, and political factors. Statutory discretionary immunity applies not only to those losses resulting from the decisions made by elected officials, but those of staff in certain circumstances. In those cases where the challenged conduct of staff amounts to nothing more than an attack on the policy itself, it is appropriate to bar the claim under the doctrine of statutory discretionary immunity. *Watson v. Metropolitan Transit Comm.*, 533 N.W.2d 406, 413 (Minn. 1996); *Nusbaum*, 422 N.W.2d at 721-722; *Holmquist*, 425 N.W.2d at 232.

Common law official immunity, as opposed to statutory discretionary immunity, "involves the kind of discretion which is exercised on an operational rather than a policy-making level." *S.W. v. Spring Lake Park Sch. Dist. # 16*, 580 N.W.2d 19, 23 (Minn. 1998); *Pletan v. Gaines*, 494 N.W.2d 38, 40 (Minn. 1992). This immunity protects a public official who is sued individually for his or her own torts. A public official charged by law with duties calling for the exercise of judgment or discretion is immune from a tort claim for damages unless guilty of a willful or malicious wrong. *Rico v. State*, 472 N.W.2d 100 (Minn. 1991). In defining acts protected by official immunity, courts have distinguished between discretionary duties (protected) and ministerial duties (not protected). A duty is ministerial "when it is absolute, certain and imperative, involving merely execution of a specific duty arising from fixed and designated facts." *Rico v. State*, 472 N.W.2d at 678. Whether discretion was involved, and official immunity applies, turns to the facts of each case. *Id.* In most circumstances, a governmental employer is entitled to share in its employees' immunity by way of vicarious official immunity. *Olson v. Ramsey*, 509 N.W.2d 368, 372 (Minn. 1993). Vicarious official immunity can serve as a defense to a claim against a governmental employer even if a governmental employee is not named individually in the Complaint.

Recreational immunity grants governmental entities immunity from "[a]ny claim based upon the construction, operation, or maintenance of any property owned or leased by the municipality that is intended or permitted to be used as a park, as an open area for recreational purposes, or for the provision of recreational services ...". Minn. Stat. § 466.03 subd. 6e. The only exception to recreational immunity arises when the claimed injury allegedly arose from a condition existing on the property. In that case, governmental entities are still liable for conduct that would entitle a trespasser to damages against a private person. Minnesota courts have adopted the Restatement (Second) of Torts standard as the standard of care owed to a trespasser. *See, e.g., Green-Glo Turf Farms v. State*, 347 N.W.2d 491, 494 (Minn. 1984). Under this standard, a governmental entity will be liable only for failing to exercise reasonable care to warn trespassers about hidden, artificial dangers knowingly created or maintained by it. *Sirek*, 496 N.W.2d at 813.

The following is a summary of case law issued in 2007 addressing statutory discretionary immunity, common law official immunity, and recreational immunity.

STATUTORY IMMUNITY

Schmitz v. City of Farmington, A06-1795, 2007 WL 2107408 (Minn. App. Jul. 24, 2007). The City of Farmington undertook a main street reconstruction project. Part of the project involved a process known as "de-watering" which is the removal of groundwater by pumping to lower the water table. After the dewatering process was completed, significant cracks appeared in the foundation walls, chimney, interior walls, and basement floor of Schmitz's house. The court held that the municipal decision to use the de-watering process would be protected by statutory discretionary immunity, but that was not what was being challenged. The court held that the challenged conduct was the actual de-watering. The court further noted that the City supervised its contractors on a daily basis and that daily monitoring is not the type of conduct protected by statutory immunity.

Armstrong v. Department of Corrections, A06-1488, 2007 WL 1893304 (Minn. App. Jul. 3, 2007). Armstrong was diagnosed with degenerative arthritis. While incarcerated, he requested a cell with a handrail near the toilet which was denied until one became available (he was offered a walker in the meantime). Later, at a halfway house, he was provided a room that was not handicap accessible until he specifically requested one. Finally, his parole was revoked and he was denied release on his projected release date. Armstrong brought a negligence claim challenging unspecified conduct. The Court dismissed the claim based upon statutory immunity holding "[i]n our view, the decisions made by the DOC in this case are quintessential discretionary policy decisions in which the DOC must balance social, political, and economic considerations such as public safety, cost, offender's needs, and rehabilitation."

COMMON LAW OFFICIAL IMMUNITY

Larrison v. John Marshall High School, A06-631, 2007 WL 152174 (Minn. App. Jan. 23, 2007). Larrison was badly injured after another student assaulted him. The classroom teacher was in his office, entering attendance into his computer. The court noted that the teacher was entering attendance in accordance with a school policy. The court further noted that the school's policy was a discretionary operational policy that resulted from the need to confirm that students are at school and their location for safety and academic purposes. The court, thus, held that because the teacher's acts were pursuant to a discretionary policy, the conduct was protected by official immunity. The claim of negligent supervision was, thus, barred.

Wilson v. City of Burnsville, A06-495, 2007 WL 1263490 (Minn. App. May 1, 2007). Wilson was suffering a heart attack when his wife called 911. The dispatcher gave the first responders the wrong address. Then, after the correct address was given, the first responders got lost. Wilson passed away. The court held that "the conduct of the emergency responders in first driving to an incorrect location, which occurred while making decisions about how to arrive at the address from which the request for emergency aide arose, is protected by official immunity." The court held, however, that the actions of the dispatcher in taking the call and accurately recording the address were ministerial; and, thus, not protected by official immunity. Note, however, that the claim arising out of the dispatcher's mistake was later barred by public duty doctrine.

Kelly v. Jerde, A06-89, 2007 WL 1531878 (Minn. May 29, 2007). A motorist was injured when her vehicle collided with a snow plow. The snow plow operator was clearing 2 ½ inches of snow and sanding in a traditional plow truck that weighed about 28,000 pounds fully loaded. As the operator was approaching an intersection, he made the decision to travel through the intersection without coming to the posted stop. He did not see the plaintiff's vehicle. The court held that official immunity barred the plaintiff's claims because the City did not have a policy requiring snow plows to stop at controlled intersections and the driver was considering factors such as the weight of the snow in front of the plow, the need to spread sand evenly across the intersection, and the ability to bring his vehicle to a stop.

Fisher v. Department of Corrections, A06-76, 77, 2007 WL 1673642 (Minn. App. June 12, 2007). Fisher had been targeted by prison gangs who subjected him to extortion and assaults. He was forced to live either in solitude (where he was still not safe) or to live in the general population. The court held that the Department of Corrections had violated Fisher's constitutional rights by failing to alleviate the known risk of harm to Fisher. The court held that because Fisher had established a constitutional violation of his rights, he had demonstrated sufficient evidence of meet the malice exception to official immunity.

Armstrong v. Department of Corrections, A06-1488, 2007 WL 1893304 (Minn. App. Jul. 3, 2007). Armstrong was diagnosed with degenerative arthritis. While incarcerated he requested a cell with a handrail near the toilet which was denied until once became available (he was offered a walker in the meantime). Later, at a halfway house, he was provided a room that was not handicap accessible until he specifically requested one. Finally, his parole was revoked and he was denied release on his projected release date. The district court held that the DOC employees were entitled to official immunity, barring Armstrong's MHRA disability discrimination claim because they did not intentionally commit any wrongful acts, but denied vicarious official immunity to the DOC. The Court of Appeals reversed the denial of vicarious official immunity holding that because the involved employees are essentially the DOC; if the individual employees did not intentionally commit any wrongful acts, then the DOC could not be held to have committed a wrongful act stripping it of vicarious official immunity protection.

Rebischke v. Metropolitan Sports Facilities Comm'n, No. A06-1605, 2007 WL 2034427 (Minn. App. Jul. 17, 2007). A 77 year old female attended a Twins game, which she often did. Her grandson led her out a set of "balance doors" after the game. The "wind effect" caused by air flowing through the door caused her to fall face-first into a turnstile, injuring her. The metrodome had a policy in place that left it to the discretion of the supervising MSFC Operating Technician, within a specified range, as to the whether conditions permitted the use of the balance doors, as opposed to revolving doors only, at the time of game end. The Court of Appeals held that official immunity could bar Plaintiff's claim because although the policy specified a range of conditions within which the doors could be used, it was ultimately the discretion of the operating technician as to whether the balance doors could be used. However, the Court of Appeals held that there was a question of fact as to whether the conditions (the static pressure) were in excess of that permitted by written policy; and, thus there was a question as to whether the operator violated the policy.

Koivisto v. Dale, 2007 WL 260810 (Minn. App. Sept. 11, 2007). A drunk driver collided with the rear-end of a snow plow. His passenger brought a claim against MnDot, asserting that the MnDot snow plow operator was negligent in moving his vehicle to the right shoulder of a highway where he intended to stop his plow and assist a motorist in the ditch that appeared to be in medical distress. The Court of Appeals affirmed dismissal of the action on the basis of official immunity. Koivisto argued that the decisions of the snowplow driver in making the lane change and moving toward the shoulder were ministerial. The court rejected that argument, stating that it would not parse out the acts of the driver. The acts of the driver were all part of a single discretionary decision—the decision of whether to cease plowing and provide assistance to a motorist.

Jasperson v. ISD #11, A06-1904, 2007 WL 313456 (Minn. App. Oct. 30, 2007). A student committed suicide. The estate claimed that the following caused the student to commit suicide: (1) a teacher told the student that he was going nowhere in life; (2) a counselor refused to meet with the student when he asked for help; and (3) the school failed to investigate bullying of the student. The court dismissed the suit on the basis of official immunity. It found that the teacher's statements to the student arose out of his discretion as to how to motivate students; the counselor had to exercise discretion in determining how to schedule appointments and respond to requests for assistance when she was responsible for counseling 1500 or more students; and the individuals who investigated the allegations of bullying exercised their discretion in conducting the investigation and reaching the conclusions that they did.

RECREATIONAL IMMUNITY

Neither the Supreme Court, nor the Court of Appeals issued any decisions regarding recreational immunity this past year. However, our firm obtained summary judgment dismissal in several cases where the claimant alleged an injury arising out of a recreational activity.

In *Adams v. ISD #625*, Ramsey County District Court dismissed a claim where a student football player injured himself while conducting a vertical jump test. During the test, Adams collided with the equipment used to measure how high he jumped. The condition causing injury (an exposed wing-nut) was open and obvious and was not likely to cause substantial bodily injury or death. Furthermore, the school district did not have any knowledge that condition was dangerous; it was a necessary piece of the equipment; and no one had been injured previously.

In *Prokop v. ISD #625*, Ramsey County District Court dismissed a claim by a baseball coach who was injured while conducting batting practice in a batting cage while using a pitching screen. The coach was stuck by a ball that was hit by his son. The coach alleged that the injury was a result of the poor condition of the pitching screen. The condition (holes in the netting of the pitching screen) were open and obvious and were not likely to cause substantial bodily injury or death. The screen had been in use for numerous years and continued to be used without any other incidences of injury. The equipment, while not ideal, was functional. This case is on appeal.

In *Belfrey v. ISD #11*, Hennepin County District Court dismissed a negligent supervision claim where a student was injured in a fight with another student during open basketball. Open basketball had been cancelled for an in-staff meeting, but certain students remained in the gymnasium after staff left to attend the meeting. Two of the students then engaged in a fist-fight, resulting in injury. The court agreed that the claim of negligent supervision arose out of a recreational event and that it was automatically barred by recreational immunity (the trespasser exception does not apply).

If you have any more questions about the above cases or immunity defenses in general, please feel free to contact Jessica Schwie at Jardine, Logan & O'Brien P.L.L.P. Ms. Schwie regularly practices in the area of government liability, defending governmental entities against various types of claims, including personal injury, employment, excessive force, and landuse. •

Firm News

Welcome Mark!

The Firm welcomes **Mark Hellie** as the most recent addition to our team of associates.

Jardine, Logan & O'Brien, P.L.L.P.'s **2008 Periodic Table of Basic Workers' Compensation Elements** is now available. If you would like a copy (or additional copies) of this informative and useful resource on workers' compensation law and rates., please submit a request to Tom Cummings at 651-290-6565 or tucmmings@jlolaw.com

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At **Jardine, Logan & O'Brien, P.L.L.P.,** we are proud of the fact that we have eight attorneys who focus a significant amount of their litigation practice defending municipalities, counties, school districts, townships, watersheds and utilities. Whether it be civil rights, environmental, employment, personal injury, land use or construction-related matters, we are ready to vigorously defend any litigation challenge. We hope you enjoy this **municipal law edition** of the JLO • *legal ease*. We look forward to assisting you should the need arise.

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If you have any questions about the subject matter of the articles in this newsletter, please feel free to contact the authors.

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