

Official Immunity for Contractors Functioning as City Officials By Hannah G. Felix

In the recent Minnesota Court of Appeals decision, *Kariniemi v. City of Rockford*, A14-0796, 863 N.W.2d 430 (Minn. App. May 18, 2015), the court addressed the question of whether contractors retained to perform functions typically assigned to city employees are protected by official immunity. This question was an issue of first impression in Minnesota.

In *Kariniemi*, plaintiffs (Nathan and Sanna Kariniemi) asserted claims of negligence and private nuisance for flooding that occurred on their property located in Rockford, Minnesota. Plaintiffs claimed the flooding was caused by defendant City of Rockford's negligent approval, design, and construction of a storm water sewer system relating to a development. At the time of the development at issue in the lawsuit, the city contracted with an engineering firm to provide services as the city engineer.

The city brought a summary judgment motion to dismiss all of plaintiffs' claims. The district court granted the city's motion for summary judgment as to plaintiffs' negligence claims. Specifically, with respect to those claims, the district court held that (1) the city was immune from suit for its approval of the storm-drainage design because the decision was of a policy making nature; (2) the city was vicariously immune for the negligent-design claim because the engineering firm was immune under the common-law doctrine for its design work while acting as the city engineer; and (3) plaintiffs failed to plead any facts that negligent construction (as opposed to negligent design) caused the flooding at their property and therefore dismissed the negligent-construction claim. With respect to plaintiffs' nuisance claim, the district court held that the city failed to timely raise immunity. Both defendant and plaintiffs appealed the district court's decision.

Plaintiffs challenged the district court's ruling that the negligent-design claim was barred by vicarious official immunity. Plaintiffs did not dispute that the conduct of design was a discretionary act or that the city would be entitled to vicarious official immunity if the engineering firm was entitled to official immunity. Rather, plaintiffs argued that a contractor, in this case the engineering firm, does not qualify as a "public official" eligible for the protections of official immunity.

The Minnesota Court of Appeals looked to the United States Supreme Court's opinion in *Filarsky v. Delia*, 132 S.Ct. 1657 (2012) for guidance on the issue. In *Filarsky*, a private person retained as an investigator for a local fire department was immune from a lawsuit alleging violations of federally protected rights in the course of the investigation. *Id.* at 1660, 1667-68. Relying on the *Filarsky* decision, the Minnesota Court of Appeals reasoned that "[a] city should not lose vicarious official immunity merely because it chooses to outsource some of its functions."

In this case, the engineering firm was functioning as the city engineer for the City of Rockford. Because the engineering firm was serving this function, the engineering firm is entitled to official immunity for discretionary acts in that role, including the design of the storm-drainage system.

The Minnesota Court of Appeals in *Kariniemi* does not address how Minnesota courts will apply official immunity to all acts of contractors hired by municipalities to perform functions other than engineering design services. It clarifies, however, the issue that a contractor qualifies as a "public official"

In Memoriam

It is with great sorrow that we advise that one of our partners, **Jason Koch**, died on June 20, 2015.



Jason was an excellent trial lawyer, son, brother and close friend to many. His death was unexpected. He will be greatly missed. ●



eligible for the protections of official immunity when functioning in a role as a city official. Official immunity, therefore, could apply to discretionary functions of contracted law enforcement, planners, designers, construction workers, and other contractors functioning in roles as city officials.

Applications for Silica Sand Mines By Nick Matchen

Minnesota's silica sand mining boom requires the Responsible Government Unit (RGU) with jurisdiction over a proposed project to balance the needs of their citizens with the desires of the developer. With the myriad of applicable legislation, regulations and court cases, it can be difficult for towns, cities and counties to navigate the silica sand mining regulatory process.

The legislature passed new silica sand mining laws in 2013. These laws have given various rulemaking authority to the Department of Natural Resources (DNR), the Environmental Quality Board (EQB), and the Minnesota Pollution Control Agency (MPCA). These agencies have been proceeding through the notice-and-comment period but no final rules have yet been issued.

The EQB, however, issued a comprehensive document titled "Tools to Assist Local Governments in Planning for and Regulating Silica Sand Projects." *EQB Approves Silica Sand Tools for Local Governments*, March 20, 2014, <https://www.eqb.state.mn.us/content/silica-sand-projects>; silica sand. In it, the EQB gives local governments tips on handling silica sand mining applications, including accounting for considerations in: Air Quality; Water Quantity and Quality; Road / Bridge Impacts; Operations & Considerations for Setbacks; and Buffers.

RGUs must pay particular attention to setback issues with trout streams. Pursuant to Minn. Stat. § 103G.217, any party wishing to mine for silica sand within one mile of a trout stream must obtain a setback permit from the DNR. The DNR's website contains a tool that lets RGUs determine if a proposed project falls within one mile of a trout stream. *Trout Stream Setback Permit*, <http://www.dnr.state.mn.us/silicasand/index.html>.

This law is being tested in a current lawsuit, *Erickson v. Minnesota Department of Natural Resources*, A14-1732 (Minn. Ct. App. argued Apr. 30, 2015). The issue in *Erickson* is whether a permit that was issued prior to the passage of the law in 2013, but is up for renewal thereafter, is considered a new development that is subject to Minn. Stat. § 103G.217. In *Erickson*, the original permit was issued in 1992, but was up for renewal in 2014. The DNR had determined that the project was new, and therefore required a setback permit, which it declined to grant. On appeal, Erickson argued that the court of appeals must review de novo the issue of whether the DNR exceeded its authority under the statute. The DNR argued it was afforded a deferential standard of review and the question for the court was whether the DNR's interpretation of the statute was reasonable and whether the record supported its decision. The court of appeals heard oral arguments in the case on April 30, 2015 and will issue a decision by the end of July 2015.

The above regulations aren't the only items local governments must consider. Under Minn. Stat. § 116D.04, an RGU must complete an Environmental Impact Statement (EIS) when a project has the potential for significant environmental effects.

A recent case from Winona County discussing the necessity for an EIS is *In re Environmental Impact Statement*, 849 N.W.2d 72 (Minn. Ct. App. 2014). The case focused on a key element of whether a project has significant environmental effects: the cumulative potential effects of related or anticipated future projects.

The court noted the following four factors used to analyze the cumulative potential effects of related or anticipated future projects:

1. Whether the cumulative potential effect is significant;
2. Whether the contribution from the project is significant when viewed in connection with other

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JLO congratulates **Lawrence M. Rocheford** on his recertification by the MSBA as a Board Certified Civil Trial Law Specialist.



Leonard J. Schweich is also a Board Certified Civil Trial Law Specialist. This is an honor achieved by less than 3% of Minnesota's licensed attorneys. ●



Legal News

Gov. Dayton signed into law two measures that will go into effect for hospital discharges in workers' compensation claims occurring on or after January 1, 2016: 1) The state introduced a diagnosis related group ("DRG") pricing model for inpatient services, where the workers' compensation payment for inpatient service will be calculated based on the Medicare MS-DRG system; and 2) Insurers must within 30 days either deny the entire bill or pay 200% of the amount under Medicare when a DRG applies and hospitals submit an electronic bill. ●

An elasticity clause in an insurance policy does not implement the 2009 Truth in Auto Law unless the policy was issued or renewed on or after November 1, 2009, the effective date of the Act, as it is not "in conflict with" the terms of policies issued or renewed before the effective date. *Wolf v. Am. Family Mut. Ins. Co.*, No. 2014AP1522-FT (Wis. Ct. App. Mar. 4, 2015). ●

An obvious gas line leak in the street presented a known and compelling danger which imposed a ministerial duty on the city to act. Therefore, the city had no immunity. *Oden v. City of Milwaukee*, No. 2014AP130 (Wis. Ct. App. Mar. 3, 2015). ●

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- contributions to the cumulative potential effect;
- The degree to which the project complies with approved mitigation measures specifically designed to address the cumulative potential effect; and
 - The efforts of the proposer to minimize the contributions from the project.

The court concluded that substantial evidence supported the Winona County Board's determination that the project would not result in significant environmental effects, and it therefore did not err in concluding no EIS was required. Specifically, the court noted that the county had considered the size of the project, whether the land could be reclaimed, whether any similar future projects were anticipated and whether the developer had submitted mine plans, performance standards and traffic impact analyses.

There are already many laws and regulations that local governments must be mindful of when considering silica sand mining projects. As various state agencies continue their rulemaking process, there are certain to be even more. ●

Firm News

The Firm welcomes **Patrick S. Collins** as a Senior Associate and **Abby J. Richardson** as an Associate.



Pat has successfully represented, counseled & obtained favorable results for numerous individuals, corporations, associations, and insurance companies throughout MN and WI for over 14 years. These disputes involve personal injury, construction, insurance coverage, insurance agents, real property, contracts, products liability and subrogation.

During his career, Pat has successfully represented clients in numerous construction defect claims. Pat has also spearheaded the contract drafting, litigation and liens for local and national construction firms.



Abby received her J.D., *magna cum laude*, from William Mitchell College of Law in 2014. She joined the firm in 2015.

Prior to joining the firm, Abby worked as an associate for a complex litigation firm in the Twin Cities. While attending law school, she completed a judicial externship in Ramsey County District Court and clerked for a complex litigation firm. ●

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Summer Grilling!

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JLO congratulates the following on their selection as a **2015 Minnesota Super Lawyer**: **Eugene J. Flick, Joseph E. Flynn, Lawrence M. Rocheford, and Leonard J. Schweich.**

Congratulations are also extended to those selected as **2015 Minnesota Rising Stars**: **Elisa M. Hatlevig, Vicki A. Hruby and Jamie L. Jonassen.**

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Jardine, Logan & O'Brien, P.L.L.P., is a mid-sized civil litigation law firm that has handled some of the region's largest and most difficult disputes with outstanding results for clients. Litigation has always been our primary focus. With trial attorneys admitted in Minnesota, Wisconsin, North Dakota, South Dakota, and Iowa, our firm has the ability and expertise to manage cases of any size or complexity. We are trial lawyers dedicated to finding litigation solutions for our clients. View our website at www.jlolaw.com to obtain additional information. Please call us to discuss a specific topic.



Nick M. Matchen
Associate
nmatchen@jlolaw.com
651.290.6531



Hannah G. Felix
Associate
hfelix@jlolaw.com
651.290.6532