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IN THIS ISSUE

- *Supreme Court Finds Private Contractor Immune From Liability as Agent of Governmental Entity*
- *Supreme Court Reaffirms Vested Rights Rule*
- *Wisconsin Supreme Court Clarifies Substantial Fault Standard for Unemployment Benefits*

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Supreme Court Finds Private Contractor Immune from Liability as Agent of Governmental Entity

In its recent decision in *Melchert v. Pro Electric Contractors,* 2017 WI 30 (April 7, 2017), the Wisconsin Supreme Court held that a privately owned construction company was not liable for severing a sewer line because of its immunity as a government contractor.

During its work as a contractor on a government construction project, Pro Electric Contractors ("Pro Electric") severed a sewer lateral line which caused flooding damage to commercial property. Several of the commercial property owners sued Pro Electric for negligence. While Pro Electric admitted that it had severed the sewer lateral, it argued that the damage occurred because of construction design decisions made by the Wisconsin Department of Transportation ("DOT") that it was merely implementing. Therefore, Pro Electric asserted that it had immunity as a government contractor pursuant to Wis. Stat. § 893.80(4). Pro Electric moved for summary judgment. The circuit court granted the motion and dismissed the case. The court of appeals confirmed.

The *Melchert* case required the Wisconsin Supreme Court to address the extent to which governmental immunity protects a private contractor implementing a construction design chosen by a governmental entity. The Court noted that it is well established that a governmental entity's immunity may extend to private contractors acting as "agents" of the governmental entity.

A contractor asserting governmental immunity must prove two elements. First, the contractor must show that it was an agent of the governmental entity under "the *Lyons* test", i.e. whether the governmental entity approved reasonably precise specifications that the governmental contractor adhered to when engaging in the conduct that caused the injury. Second, the contractor must be able to demonstrate that the conduct for which immunity is sought was the implementation of a governmental entity's decision made during the exercise of the entity's legislative, quasi-legislative, judicial, or quasi-judicial functions. The Court noted that for a private entity contracting with a governmental entity, this is where immunity ends.

The Court held that Pro Electric was in fact immune because it "acted in accordance with reasonably precise design specifications adopted by a governmental entity in the exercise of its legislative, quasi-legislative, judicial, or quasi-judicial functions." Pro Electric had complied with DOT's specifications as to the activities that severed the sewer lateral.

Continued on page 2

Supreme Court Reaffirms Vested Rights Rule

In its recent opinion, the Wisconsin Supreme Court declined to abandon a longstanding rule about when property owners acquire vested rights to develop their property in conformity with existing zoning regulations. In *McKee Family I, LLC v. City of Fitchburg*, 2017 WI 34, a developer argued that, even though its property had recently been rezoned to a lower-density zoning district, it should still be allowed to proceed with the high-density project it had planned under the prior zoning designation because it had spent a substantial amount of money developing plans and obtaining preliminary approvals before the property was rezoned. The Court disagreed.

The developer owned property in Fitchburg that was in a Planned Development District ("PDD") zoning classification. The PDD classification allowed for relatively high density mixed-use development on the property, but required the property owner to go through a number of preliminary approval processes prior to being eligible to apply for a building permit. The property owner completed the first step of the process—obtaining common council approval of a "General Implementation Plan"—in 1994, and then spent a number of years developing nearby lots.

In 2008, the developer entered into negotiations with JD McCormick Company, LLC ("McCormick") to sell two undeveloped PDD lots. The sale was contingent on McCormick's ability to obtain approval from Fitchburg to build 128 apartment units on the lots. McCormick presented its plan at a neighborhood meeting and neighbors expressed concern about the project's effect on traffic, crime, and housing values. Ultimately, six hundred Fitchburg residents signed a petition opposing the project.

Nevertheless, McCormick proceeded to hire an architect, engineer, and landscape architect to prepare and submit a Specific Implementation Plan ("SIP") for the project—the second step of the PDD approval process—to the City. Instead of approving the SIP, the Common Council responded to the community petition by changing the zoning classification of the property from PDD to Residential–Medium, which would limit development on the property to only 28 apartment units.

The developers sued the City of Fitchburg, arguing that, because McCormick had already made substantial expenditures in preparation for development under the PDD zoning, it should be allowed to build that project in spite of the rezoning. Fitchburg disagreed, invoking Wisconsin's longstanding building permit rule. Under this rule, a property owner has no "vested right" to proceed with a project in spite of municipal rezoning until it has submitted an application for a building permit that conforms to the zoning code requirements in effect at the time of the application.

The Court sided with Fitchburg. The developers had asked the Court to abandon the building permit rule and instead evaluate whether a developer has vested rights on a case-by-case basis, based on whether the developer has made substantial expenditures in reliance on the existing zoning classification. The Court dismissed this solution, arguing that a rule that required case-by-case analyses would create unnecessary uncertainty for all involved. Instead, it reaffirmed Wisconsin's bright-line building permit rule because it "creates predictability for land owners, purchasers, developers, municipalities and the court." The Court pointed out that the building permit rule balances the interests of municipalities and landowners: "A municipality has the flexibility to regulate land use through zoning up until the point when a developer obtains a building permit. Once a building permit has been obtained, a developer may make expenditures in reliance on a zoning classification." Because the developers had not applied for a building permit at the time Fitchburg rezoned the property, they had no vested rights in developing the property under the PDD zoning classification.

— Julia Potter

Private Contractor Immune from Liability

Continued from front page

The Court also considered and applied certain provisions of the Digger's Hotline statute, codified at Wis. Stat. § 182.0175. The property owners alleged that Pro Electric caused damages not only by severing the sewer lateral, but also by backfilling the excavation without inspecting the sewer lateral for damage and allowing repairs to be made as the Digger's Hotline statute requires. The Court ruled that Pro Electric is not immune from liability with respect to that allegation, because DOT did not provide it with reasonably precise specifications for inspection of the lateral. As such, Pro Electric was not DOT's agent with regard to those duties. However, ultimately the Court found that the facts did not support a finding that Pro Electric failed to comply with its duties found in Wis. Stat. § 182.0175(2)(am).

The decision granting summary judgment for Pro Electric was reached by a four justice majority.

— Ashley Rouse

Wisconsin Supreme Court Clarifies Substantial Fault Standard for Unemployment Benefits

On May 4, 2017, the Wisconsin Supreme Court ruled that an employee who committed eight cash-handling errors over the course of 80,000 transactions was not discharged due to "substantial fault" and, therefore, was eligible for unemployment compensation benefits. *Operton v. LIRC*, 2017 WI 46 ("*Operton*").

Since the legislature amended the unemployment law in 2013, there has been a three-step analysis used to determine whether a terminated employee is eligible for unemployment benefits. First, the agency or court determines if the employee committed "misconduct" under any of the enumerated bases of specified in the amended statute (e.g., theft, harassment, violence, or violation of a known substance abuse policy). If the agency or court concludes the employee actions do not meet the new statutory standard, it assesses whether those actions meet the general standard for "misconduct" defined as "one or more actions or conduct evincing willful or wanton disregard of the employer's interests." Finally, if the conduct does not meet this standard, the court or agency will review whether the employee engaged in conduct that qualifies as "substantial fault."

"Substantial fault" includes those acts or omissions of an employee over which the employee exercised reasonable control and which violate reasonable requirements of the employee's employer but does **not** include any of the following:

1. One or more minor infractions of rules unless an infraction is repeated after the employer warns the employee about the infraction;
2. One or more inadvertent errors made by the employee; or
3. Any failure of the employee to perform work because of insufficient skill, ability, or equipment.

Wis. Stat. § 108.04(5g). In *Operton*, the question was whether Operton's cash-handling errors constituted "inadvertent errors" and, thus, did not qualify as substantial fault.

Operton worked for Walgreens from July 17, 2012 to March 24, 2014 as a checkout clerk. Operton handled more than 100 cash-handling transactions a day during the course of her employment. She was terminated after her eighth cash-handling error.

The Court explained that Wisconsin has a strong public policy in favor of compensating the unemployed. The burden is on the employer to show that the employee was terminated due to "substantial fault." When determining whether an employee is disqualified from benefits due to "substantial fault," the agency or court must individually examine each of the three statutory exceptions.

The Court noted that "inadvertence" is defined as "an accidental oversight; the result of carelessness." While the fact that an employer warned an employee may have some relevance in determining whether an employee's error was inadvertent, such is not determinative. The Court held that multiple inadvertent errors, even if the employee was warned about the errors, do not necessarily constitute "substantial fault."

In reviewing the facts in *Operton,* the Court concluded that eight accidental or careless errors were "inadvertent errors" when they were made over the course of 80,000 cash-handling transactions during a 21-month period. The Court did not provide an answer to when the number of employee errors that seem inadvertent in isolation cease to be inadvertent when viewed in their totality. In this case, the length of time between the errors was significant to the Court. Operton went months without making a cash-handling error. Additionally, Operton violated a slightly different cash-handling rule each time she made a mistake. The Court concluded that her errors were precisely the type of conduct that the legislature intended to exempt from the definition of "substantial fault."

One of the questions that the Court considered in its decision was the level of deference courts give to decisions of the Labor and Industry Review Commission ("LIRC") (the state agency that hears appeals of unemployment and discrimination determinations made by the Department of Workforce Development). Depending on the nature of the issue decided by the agency, courts have given varied degrees of deference to state agency decisions. Three justices, in a concurring opinion, expressed a willingness to overhaul dramatically the Wisconsin courts' approach to agency deference. This would have wide-reaching consequences in a number of areas of the law, including employment law. However, because the majority opinion concluded that regardless of the level of deference afforded to LIRC's decision in this case the outcome would be the same, the deference issue was not directly addressed by the Court. Nevertheless, the concurring opinion suggests that the Court might consider this issue in a future case.

— Brian P. Goodman

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