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LAW BULLETIN MEDIA

High court gives detailed account on torts, discretionary immunity

In *Andrews v. Metropolitan Water Reclamation District of Greater Chicago*, the Illinois Supreme Court recently addressed whether a local governmental entity, in this case the reclamation district, was entitled to discretionary immunity under Sections 2-109 and 2-201 of the Tort Immunity Act for injuries to the employees of a contractor.

The employees were injured in a fall while descending to the bottom of a 29-foot effluent chamber at the Calumet Water Reclamation Plant where they were planning to apply some grout.

The reclamation district owns the water reclamation plant but had hired a contractor to do the grout and other work. The contract provided, among other things, that it was the responsibility of the contractor to determine the procedures and methods for the work, furnish all temporary structures and safety equipment needed and furnish all personnel.

The contract required submittal of the plans for the work to the reclamation district's engineer, who then had the right to disapprove and reject any procedures and methods he deemed unsafe.

The contract provided that the engineer's acceptance of any plans did not relieve the contractor of its responsibility for safety, maintenance and repairs.

To reach the bottom of the effluent chamber, the workers used a two-ladder configuration that required the workers to transition from one ladder to the next.

The workers were required to ascend one ladder to reach the top of the chamber and then transition to another ladder which was set inside the chamber. There was no platform for transitioning between the ladders. One worker fell during the transition and landed on the other worker, who was already at the bottom of the chamber. Both workers were severely injured.

The trial court granted the reclamation district's motion for summary judgment,



TORT LAW

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finding the district was absolutely immune from liability based on the discretionary immunity provisions of the Tort Immunity Act.

The court found that the district engineer had discretionary authority to make policy determinations to enforce project safety under the terms of the contract between the district and the contractor. Based on the contract language, the trial court concluded that the district had absolute immunity. The 1st District Appellate Court reversed the trial court.

The Supreme Court, with two justices dissenting, affirmed the appellate court's decision that the reclamation district was not entitled to discretionary immunity. It first noted that, read together, Sections 2-109 and 2-201 shield local governmental entities from the discretionary acts or omissions of its employees.

The court also noted its previous discretionary immunity decisions that held a municipality seeking immunity under Section 2-201 for failure to repair a defective

condition "must present sufficient evidence that it made a conscious decision not to perform the repair" and that in the absence of a conscious decision "nearly every failure to maintain public property could be described as an exercise of discretion."

The court reasoned that if an employee is totally unaware of a condition prior to a plaintiff being injured, the employee could not possibly have exercised discretion with respect to the condition.

The Supreme Court found that there was no evidence documenting a decision by reclamation district's employees with respect to the ladder condition. There was simply no decision-making process at all on the ladder issue.

There was no evidence that the district engineer exercised any judgment or skill in making a decision about the ladders or access platforms and no evidence that there was a balancing of competing interests. In fact, the engineer admitted that he was totally unaware of the two-ladder configuration.

The district argued that the engineer's election not to comment on safety issues was a conscious exercise of discretion under Section 2-201 of the Tort Immunity Act. In sum, the district claimed that the engineer's choice not to make any safety decision at all is an "omission" as that term is understood in Section 2-201.

The Supreme Court disagreed with this reasoning: "[A]n 'omission' must be construed as an affirmative decision to take no action given the circumstances." In the majority's view, no such decision was made in this case since the engineer was totally unaware of the ladder configuration. A decision made by default "is insufficient to invoke discretionary immunity."

The court also noted that its reasoning was consistent with public policy, as allowing immunity for nondecisions would reward public officials and employees who ignore problems instead of addressing them.