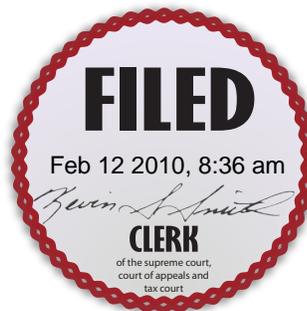


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ATTORNEY FOR APPELLANT:

ERIK C. JOHNSON
Ice Miller LLP
Indianapolis, Indiana

ATTORNEY FOR APPELLANT
PRO HAC VICE:

MARK J. McANDREW
Ice Miller LLP
Lisle, Illinois

ATTORNEYS FOR APPELLEE:

MATTHEW L. HINKLE
BRANDI A. GIBSON
Coots, Henke & Wheeler, P.C.
Carmel, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

KEVIN WALSH; WILLIAM WALSH; JOHN)
M. WALSH; VIRGINIA E. WALSH and)
JAMES WALSH; individually; and WILLIAM)
WALSH and JILL WALSH, as parents and)
Next friend of HOLLY RENEE WALSH and)
HEATHER LYNN WALSH, minor children,)

Appellants-Respondent,)

vs.)

CITY OF VALPARAISO, INDIANA,)

Appellee-Petitioner.)

No. 64A05-0906-CV-339)

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable Thomas W. Webber, Sr., Judge
Cause No. 64D03-0203-CT-2530

February 12, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

The appellants' Valparaiso home was serviced by an antiquated sewage system. Their property experienced flooding and water damage following a sewer backup. The appellants filed this action against the City of Valparaiso alleging negligence in the maintenance, use, and repair of the sewer line serving their house. The trial court entered summary judgment in favor of Valparaiso. We conclude that the City is entitled to discretionary immunity under the Indiana Tort Claims Act. We affirm.

Facts and Procedural History

William and Jill Walsh lived on Valparaiso Street in Valparaiso, Indiana. The sewer system serving their property was constructed in the 1930s or 40s. It was a combined sewer line, conveying both storm water and sewage from residences and businesses. Combined sewer systems are problematic and are often unable to accommodate heightened flow during periods of heavy rainfall. The Walsh property was also in a low-lying area and had a driveway that sloped upward toward the adjacent street. For all these reasons, the Walshes' home was susceptible to sewage overflow and flooding.

Back in the 1960s combined sewage systems were recognized as a national problem for municipalities, and Valparaiso prohibited any further construction of them. Over the next several decades, the City developed plans to assess and renovate its combined sewer systems. In 1965 O.M. Leonard & Associates submitted a report

recommending separate sewage systems and identifying those areas where sewer improvements would most economically benefit the community. In 1976 Cole Associates prepared a Sanitary Sewer and Storm Drainage Master Plan (“the Master Plan”). The Master Plan identified and assessed Valparaiso’s sewage problems and proposed recommendations to improve drainage in problem areas. The plan recognized that installing separate storm sewers would be expensive. The plan prioritized various improvements over others based on budgetary constraints. The separation of the combined sewage system serving the Walshes’ property ranked fifth in priority. Some of the Master Plan’s projects were financed but others were not due to inadequate funding. In the interim Valparaiso designed several projects to retain overflow and control the quantity of sewage entering the wastewater treatment plant. The City also solicited evaluations from PTGR, Inc. PTGR submitted a proposal to Valparaiso’s Board of Public Works and Safety. PTGR recommended constructing a new major storm line and installing sewer check valves.

By 1984 the City had begun work on the Valparaiso Street Project (“VSP”). The VSP was a comprehensive reconstruction plan which aimed, among other things, to address the sewage issues along Valparaiso Street. In 1994 Cole Associates prepared an Infrastructure Needs Assessment Plan for the Board of Public Works and City Council. The infrastructure plan set forth a list of priority projects and a completion schedule. The plan hinged both on available funding and the extent to which other neighborhood projects were completed. The VSP was listed as one of the top priority storm water and sanitary sewer projects. Two years later Valparaiso created a Department of Stormwater

Management and formed the Stormwater Management Board (“SWMB”). Its function was to evaluate storm water management issues and prioritize problems based on funding constraints. The department reviewed complaints, defined the nature and extent of the City’s problems, discussed possible solutions, and developed funding strategies for the proposed projects. The SWMB enumerated the following criteria for prioritizing drainage issues: (1) location, (2) extent of obligation, (3) risk, (4) impact, (5) cost, (6) environment, (7) term, and (8) efficacy. The VSP was listed as one of the SWMB’s top priorities.

Valparaiso worked with the Indiana Department of Transportation to fund the VSP. Valparaiso also sought federal monies as well. However, the VSP incurred a number of financial and bureaucratic setbacks. Costs escalated. Funds dried up. Other neighborhood projects took precedence. Construction on the VSP ultimately would not begin until 2007.

Meanwhile, in the early 1990s, city inspectors had investigated the Walshes’ combined sewer line and found evidence of roots, cracks, and broken tile. In 2000 inspections revealed offset joints, cracks, broken pipes, water infiltration, elliptical pipe sections, broken taps, and root intrusions. Similar issues were identified again in 2001. No steps were taken to fix the problems.

In July and August 2001, a backup occurred in the sewer line servicing the Walshes’ home. Sewage flooded into the Walsh property through the toilets and drains. The sewage accumulated in the Walshes’ basement and the rear of their residence. The flooding damaged personal property and William Walsh’s automobile business inventory.

The Walshes filed this action against the City of Valparaiso claiming the City was negligent in its maintenance, use, and repair of their home's sewer line. The Walshes alleged:

- A. Failure to timely repair and maintain broken or nonfunctioning sanitary sewer, storm sewer or other utility lines owned and operated by the City of Valparaiso.
- B. Failure to provide an adequate surface water drainage, sanitary sewer, storm sewer or other utility system of adequate size, quality and quantity to service the properties of the plaintiffs and the plaintiffs' neighborhood.
- C. Failure to adequately provide for surface water drainage and sanitary sewage removal for the benefit of the neighborhood in which the plaintiffs' properties are located.
- D. Failure to properly regulate commercial and residential development in the City of Valparaiso with adequate provision for proper handling of storm water, surface water and sanitary sewage in the City of Valparaiso which resulted in the flooding and sewer backup on the plaintiffs' property and in the plaintiffs' neighborhood.
- E. Failing to take corrective action to eliminate flooding and sewer backup on the plaintiffs' property and in the neighborhood of the plaintiffs caused by the acts and omissions of the City of Valparaiso in spite of the City having prior knowledge of the existence, nature and cause of said flooding and sewer backup.

Appellants' App. p. 16. The trial court entered summary judgment in favor of Valparaiso. The court found that the Walshes' claim was barred by the two-year statute of limitations, that the Walshes failed to provide notice of their claim in accordance with the Indiana Tort Claims Act, and that the City enjoyed discretionary immunity under the Tort Claims Act as well. The Walshes now appeal.

Discussion and Decision

The Walshes raise three issues which we reorder and restate as follows: whether they substantially complied with the notice requirements of the Tort Claims Act, whether Valparaiso is equitably estopped from pleading the statute of limitations, and whether Valparaiso is entitled to discretionary immunity from the Walshes' claim. We find the last issue dispositive and therefore decline to address the first two.

The Tort Claims Act, Indiana Code sections 34-13-3-1 to -25, provides that governmental entities are subject to liability for torts committed by their agencies or employees unless one of the immunity provisions of the Act applies. *City of South Bend v. Dollahan*, 918 N.E.2d 343, 350 (Ind. Ct. App. 2009). Whether an immunity provision applies is a matter of law for the courts to decide. *Gary Cmty. Sch. Corp. v. Roach-Walker*, 917 N.E.2d 1224, 1226 (Ind. 2009). Because the Act is in derogation of the common law, we must construe it narrowly and decline to find immunity if possible. *Lee v. State*, 682 N.E.2d 576, 578 (Ind. Ct. App. 1997), *trans. denied*. The party seeking immunity bears the burden of establishing its immunity. *Gary Cmty. Sch. Corp.*, 917 N.E.2d at 1226.

Section 34-13-3-3(7) of the Act provides that a governmental entity or an employee acting within the scope of the employee's employment is not liable if a loss results from "[t]he performance of a discretionary function." Discretionary immunity recognizes "that certain types of decisions made by the executive and legislative branches of government should not be subject to judicial review because of the separation of powers doctrine," as "litigation might have a 'chilling effect' on the government's

resolution of difficult policy issues, or because certain governmental decisions cannot be adequately reviewed using a traditional tort standard of negligence.” *Mullin v. Mun. City of South Bend*, 639 N.E.2d 278, 281 (Ind. 1994) (citing *Peavler v. Monroe County Bd. of Comm’rs*, 528 N.E.2d 40, 46 (Ind. 1988)).

Indiana applies the “planning/operational” test to determine whether governmental acts are discretionary. *Id.* Under the planning-operational test, we distinguish between decisions involving the formulation of basic policy, which are entitled to immunity, and decisions regarding only the execution or implementation of that policy, which are not entitled to immunity. *Greathouse v. Armstrong*, 616 N.E.2d 364, 366-67 (Ind. 1993). The distinction between planning and operational functions “is a standard, rather than a precise rule. The focus must remain on the policy underlying governmental immunity. If the act is one committed to coordinate branches of the government involving policy decisions not reviewable under traditional tort standards of reasonableness, the government is immune from liability even if the act was performed negligently.” *Peavler*, 528 N.E.2d at 45. Factors that point toward immunity include:

1. The nature of the conduct—
 - a) Whether the conduct has a regulatory objective;
 - b) Whether the conduct involved the balancing of factors without reliance on a readily ascertainable rule or standard;
 - c) Whether the conduct requires a judgment based on policy decisions;
 - d) Whether the decision involved adopting general principles or only applying them;
 - e) Whether the conduct involved establishment of plans, specifications and schedule; and
 - f) Whether the decision involved assessing priorities, weighing of budgetary considerations or allocation of resources.
2. The effect on governmental operations—

- a) Whether the decision affects the feasibility or practicability of a government program; and
 - b) Whether liability will affect the effective administration of the function in question.
3. The capacity of the court to evaluate the propriety of the government's action—Whether tort standards offer an insufficient evaluation of the plaintiff's claim.

Id. at 46.

At least three Indiana “sewer cases” help illustrate the planning/operational distinction. *See City of Valparaiso v. Defler*, 694 N.E.2d 1177 (Ind. Ct. App. 1998), *reh'g denied, trans. denied*; *Beck v. City of Evansville*, 842 N.E.2d 856 (Ind. Ct. App. 2006), *reh'g denied, trans. denied*; *City of Bloomington Utils. Dept. v. Walter*, 904 N.E.2d 346 (Ind. Ct. App. 2009), *trans. denied*.

In *Defler*, the City of Valparaiso had a defective sewer line. 694 N.E.2d at 1178. The city sought recommendations from a private firm to solve the sewer problem. *Id.* Based on the firm's evaluation, the city chose to install a new sewer lift station. *Id.* The lift station was constructed adjacent to the plaintiff homeowners' property. *Id.* The station contractor was required to pump groundwater out of the excavation site in order to maintain the appropriate water level. *Id.* at 1179. Groundwater was subsequently removed from the homeowners' property, which in turn caused their land to subside. *Id.* The homeowners filed suit against the city, *id.* at 1178, and the city in part claimed discretionary immunity, *id.* at 1182. The city argued that its decision to build a sewer lift station was a policy decision, made only after it balanced the risks and benefits associated therewith. *Id.* at 1183. This Court held that the city was not immune from liability. *Id.* Though the decision to build a lift station, as compared to other alternatives for correcting

the city's sewage problem, may have been a planning function, the homeowners did not challenge the decision to build the lift station. *Id.* Instead, they challenged the method by which it was constructed, "specifically, the decision to dewater the construction site to such an extent that the [homeowners'] land subsided." *Id.* "This decision, although it required the City and its contractors to exercise professional judgment, is one which may be evaluated under traditional tort standards of reasonableness." *Id.*

In *Beck*, the plaintiff homeowners resided in naturally low-lying areas of Evansville, Indiana. 842 N.E.2d at 858. Their neighborhoods were prone to flooding after heavy rainfall, as their sewer lines were operating beyond capacity. *Id.* The city commissioned a Stormwater Master Plan in 1996 to address its drainage problems. *Id.* The plan was implemented by the Common Council and the Board of Public Works. *Id.* The plan prioritized certain localities over others due to budgetary constraints. *Id.* In 2003 the homeowners' neighborhoods were flooded following severe storms. *Id.* at 859. Sewage and surface water flowed onto their property and into their homes. *Id.* The homeowners sued the city alleging nuisance, negligence, and inverse condemnation. *Id.* The city claimed, among other things, that it enjoyed discretionary immunity from the homeowners' suit, and this Court agreed. *Id.* at 860, 863. We evaluated the facts in light of the *Peavler* factors. *Id.* at 862. We noted that the city was required to weigh competing interests when it set priorities under the Master Plan. *Id.* The city engaged professional engineers to establish specifications and schedules for the implementation of the Plan. *Id.* "While a portion of the Plan was completed before the flood damage occurred to the homeowners' residences, much of it was still being implemented at the

time of the flooding, including the plan to address the problem in the homeowners' neighborhoods." *Id.* The city also formed a comprehensive plan of maintenance and service for its sewers. *Id.* at 862-63. We concluded that the city was performing a discretionary function when it commissioned and adopted its Master Plan, and that it was therefore immune to the homeowners' claim. *Id.* at 863.

In *Walter*, the City of Bloomington Utilities Department ("CBU") adopted a Capacity, Management, Operations and Maintenance Program ("CMOM") outlining the guidelines by which the city's sewers would be inspected, cleaned, and repaired. 904 N.E.2d at 352-53. According to the CMOM, CBU was responsible for maintaining certain types of sewer sections, including public gravity lines of eight inches in diameter or more. *Id.* at 352. The CBU would employ only certain means for clearing pipes and would not use chemicals for root control. *Id.* The plaintiff homeowners' residence was flooded following a blockage in a public, eight-inch sewer line. *Id.* at 348. The homeowners alleged that CBU "negligently planned, designed, installed, operated, maintained, and controlled the sewer lines serving" them. *Id.* at 352. We held that CBU was not entitled to discretionary immunity. *Id.* at 353. We distinguished the case from *Beck* and likened it to *Defler*. *Id.* at 350-52. We acknowledged that the CMOM "reflected both policy decisions and guidelines for sewer operation. CBU engaged in policy-oriented decision-making when it determined which part of the system it would maintain (gravity sewers equal to or greater than eight inches in diameter and public force mains) and that it would not use chemicals for root control. However, much of the CMOM Program merely set forth 'things that [CBU has] been doing for years.'" *Id.* at

353 (brackets in original). While the decisions respecting sewer maintenance required CBU and its employees to exercise professional judgment, those decisions could be evaluated under traditional tort standards of reasonableness. *Id.* We found no convincing designated evidence in the record that CBU's actions involved the formulation of policy that would entitle it to discretionary immunity. *Id.*

Another instructive case from outside the sewage context is *City of Crown Point v. Rutherford*, 640 N.E.2d 750 (Ind. Ct. App. 1994), *reh'g denied, trans. denied*. In *Rutherford*, the City of Crown Point had instituted a comprehensive scheme to repair and renovate its sidewalks. 640 N.E.2d at 754. The city received funding from the Housing of Urban Development and the Board of Public Works, and it allocated monies based on competing interests and priorities. *Id.* at 753-54. The key decision-makers contemplated and balanced public policy concerns and weighed budgetary restrictions when it allocated resources. *Id.* at 754. The city prioritized renovating school zones, children's play areas, and other high traffic areas such as the town square. *Id.* The plaintiff tripped and fell on a portion of broken sidewalk. *Id.* at 751. The plaintiff sued the city, but we held that Crown Point was entitled to discretionary immunity. *Id.* at 755. We explained that when designing its sidewalk renovation plans, the city "made discretionary decisions about policy formation which involved assessment of competing priorities and a weighing of budgetary considerations and the allocation of scarce resources." *Id.* We "decline[d] to second-guess this decision which clearly involves the exercise of judgment and the formulation of basic policy on the part of Crown Point officials." *Id.*

We believe the instant case is unlike *Walter and Defler* and most akin to *Beck* and *Rutherford*. Here the Walshes' home was serviced by a deficient, antiquated sewer line which had been constructed in the early twentieth century. As in *Beck*, the City adopted a series of plans to renovate its sewer system and eradicate combined sewage lines. The City enlisted consultants to develop and implement sewage renovation projects. The City weighed competing policy interests when it adopted its strategies, and it prioritized certain problems over others due to necessity and budgetary constraints. In light of the *Peavler* factors, we find that Valparaiso was exercising a "planning" or "discretionary" function when it formulated its various sewage reconstruction plans. The Walshes nonetheless argue that the City was negligent by taking no action after a series of inspections in 1991, 2000, and 2001. But unlike in *Walter and Defler*, the City was not negligently implementing an established protocol or ministerial function. Instead, Valparaiso had not remedied the Walshes' sewer line because it was engaged in a broader, policy-oriented approach to fix the City's numerous and pervasive sewage problems. And though the City could have installed remedial mechanisms like pumps, check valves, or detention ponds to improve the Walshes' situation, those too would have cost money and would have been subject to the same policy and fiscal evaluation essential to the City's various renovation strategies. We conclude that Valparaiso was exercising a discretionary function when it adopted its sewage plans and delayed renovation of the sewage system servicing the Walsh property. The City is therefore entitled to discretionary immunity from the Walshes' claim.

For the foregoing reasons, we conclude that Valparaiso enjoys discretionary immunity under the Tort Claims Act, and the trial court properly entered summary judgment in Valparaiso's favor.

Affirmed.

RILEY, J., and CRONE, J., concur.