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***Boulder City v. Boulder Excavating*, 124 Nev. Adv. Op. No. 65¹
(Sept. 11, 2008)**

TORT LAW – DISCRETIONARY-ACT IMMUNITY

Summary

Appeal from a district court order denying discretionary-act immunity to the City of Boulder City (“Boulder”) in a case where Plaintiff sued the city on various tort claims.

Disposition/Outcome

Reversed the district court order granting discretionary-act immunity to Boulder for all claims.

Factual and Procedural History

This case arose from actions surrounding a bid for a construction job. Boulder was receiving bids on a veteran’s memorial project.² McComb Construction (“McComb”) submitted the lowest bid. McComb’s bid listed Boulder Excavating, Inc. (“BEI”) as a subcontractor. Boulder had experienced problems with BEI before on several other jobs. Boulder’s problems with BEI included, among other things, BEI failing to perform contracts and demanding more money, and drawn out arbitration surrounding a road construction dispute. Consequently, Boulder’s engineer, Scott Hansen, asked McComb to replace BEI with a different subcontractor. McComb replaced BEI, and Hansen accepted the bid.

Subsequently, BEI sued both Hansen and Boulder for various tort claims including defamation and intentional and malicious interference with contract. The district court bifurcated the proceedings holding one proceeding for liability and one for damages.

In the liability proceeding, the district court found that Hansen was immune due to qualified governmental immunity based on discretionary acts, though neither defendant had raised the issue. The court did not extend this immunity to Boulder.

In the damages proceeding, Boulder attempted to raise the issue of discretionary-act immunity. However, the court found that Boulder had waived this immunity by failing to raise it in the liability proceeding. The court then ordered Boulder to pay \$50,000 in damages to BEI.

Boulder appealed to the Nevada Supreme Court. On appeal Boulder argued the district court erred by not granting discretionary-act immunity to Boulder. BEI responded to Boulder’s argument by claiming that Boulder waived the immunity by not

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2 The bid was for Phase I of the Veteran’s Memorial Park, a multimillion dollar public project.

raising it as an affirmative defense at the initial liability proceeding. The court agreed with Boulder's argument and reversed the district court's order.

Discussion

Waiver of discretionary-act immunity:

The Nevada Supreme Court held that Boulder did not waive discretionary-act immunity by failing to raise it as an affirmative defense in the liability proceeding. The court made a distinction between issues of absolute governmental immunity and issues of qualified governmental immunity. A defendant may raise a defense of absolute governmental immunity at any time because absolute governmental immunity implicates subject matter jurisdiction. A defendant avoids waiver of qualified governmental immunity only if defendant affirmatively pleads it, the parties consent to raise the issue, or the issue is otherwise litigated in the matter.

Discretionary-act immunity is a qualified governmental immunity. Therefore, Boulder would have waived the immunity by failing to raise it as an affirmative defense. However, the district court raised the issue *sua sponte* with regard to Hansen. Neither BEI nor any other party objected to the court's raising of the issue. Consequently, the parties consented to raise the issue. Therefore, Boulder did not waive discretionary immunity.

Statutory immunity:

Nevada statutes say that the government is immune from liability when a state actor performs a discretionary-act function on the part of a political subdivision of the state.³ BEI's only claims against Boulder were claims that arose through Hansen's acts. The district court held that Hansen was entitled to discretionary-act immunity for his acts. Boulder is a political subdivision of Nevada. Therefore, the court held that the Hansen's immunity should extend to Boulder.

Discretionary-act immunity:

The Nevada Supreme Court applied a two-prong test for discretionary-act immunity.⁴ First, the state's or state actor's decision must involve an element of individual judgment. Second, the state or state actor must base the decision on public policy. Hansen had to use his individual judgment to determine whether having BEI as a subcontractor on a public project would further the public policy of conserving public funds. Hansen looked to past experience with BEI. He then decided that having BEI on the project would undermine the public's interest in conserving public funds. Therefore, the district court correctly found that Hansen was entitled to discretionary-act immunity.

Conclusion

³ See Nev. Rev. Stat. § 41.032(2) (2008).

⁴ This test was recently set forth in *Martinez v. Maruszczac* to clear up confusion among district courts and bar members. 168 P. 3d 720, 729 (Nev. 2007).

The court found that Boulder did not waive discretionary-act immunity because the parties consented to the lower court's raising of the issue of discretionary-act immunity. The lower court held that Hansen was entitled to immunity. Therefore, Boulder was automatically entitled to the same immunity because BEI's only claims against Boulder were through Hansen's acts. Hansen qualified for discretionary-act immunity because he made an individual judgment based on public policy on behalf of the state. Therefore, the court reversed the district court and granted discretionary-act immunity to Boulder for all claims by BEI.