COURT OF APPEALS
DECISION
DATED AND FILED

July 3, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2395 **Cir. Ct. No. 2012CV37**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

BARBARA LARSEN AND ROGER LARSEN,

PLAINTIFFS-APPELLANTS,

STATE OF WISCONSIN DEPARTMENT OF ADMINISTRATION – BUREAU OF RISK MANAGEMENT,

PLAINTIFF,

V.

WISCONSIN COUNTY MUTUAL INSURANCE COMPANY AND PORTAGE COUNTY, WISCONSIN,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Portage County: PATRICK J. TAGGART, Judge. *Affirmed*.

Before Lundsten, Sherman and Kloppenburg, JJ.

¶1 SHERMAN, J. Barbara and Roger Larsen appeal an order of summary judgment in favor of Portage County and its insurer, Wisconsin County Mutual Insurance Company (collectively, "Portage County") on the basis of governmental immunity. The Larsens brought suit against Portage County seeking to recover damages for injuries Barbara allegedly sustained when she slipped and fell inside the building housing the Portage County Circuit Court. The circuit court granted Portage County's motion for summary judgment, determining as a matter of law that Portage County is immune under WIS. STAT. § 893.80(4) from the Larsens' claims. The Larsens argue that two exceptions to the immunity doctrine apply: the ministerial duty exception and the clear and compelling danger exception. We agree with the circuit court that neither applies. Accordingly, we affirm.

BACKGROUND

¶2 The following facts are taken from the summary judgment submissions and are undisputed for purposes of this appeal. On September 8, 2009, Portage County employees noticed a slippery area in a Portage County Circuit Court room. At least one of those employees slipped, although he was not injured. At approximately 1:30 p.m. on that day, Barbara walked on this area and slipped and fell, and sustained personal injuries. Barbara was working as a court reporter at the time of her fall.

¶3 The Larsens brought suit against Portage County claiming that the injuries Barbara sustained from her fall resulted from Portage County's negligence and Portage County's failure to comply with WIS. STAT. § 101.11, Wisconsin's safe place statute. Portage County moved for summary judgment, claiming in part that Portage County was immune from suit pursuant to WIS. STAT. § 893.80(4)

(2011-12).[1] The circuit court granted Portage County's motion for summary judgment and dismissed the Larsens' claims. The circuit court determined that no exceptions to governmental immunity applied in this case and that Portage County was therefore immune. The Larsens appeal. Additional facts will be discussed below as necessary.

DISCUSSION

¶4 The Larsens contend that the circuit court erred when granting summary judgment in favor of Portage County on the basis of governmental immunity, because, according to the Larsens, both the ministerial duty exception and the known and compelling danger exception to immunity apply in this case.[2]

¶5 We review the grant of summary judgment de novo. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. A party is entitled to summary judgment when there are no genuine issues of material fact and the party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶6 WISCONSIN STAT. § 893.80(4) immunizes governmental units against liability "for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions."[3] The supreme court has explained that

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] The Larsens also challenge the determination by the circuit court that the State of Wisconsin is not entitled to an additional $50,000 cap, pursuant to WIS. STAT. § 893.80(3), on its claims for reimbursement under WIS. STAT. § 102.29. Because our decision with respect to the issue of immunity is dispositive, we do not address this argument. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716.

[3] WISCONSIN STAT. § 893.80(4) provides: "No suit may be brought against any [governmental subdivision] or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions."

§ 893.80(4) codified its decision in ***Holytz v. City of Milwaukee***, 17 Wis. 2d 26, 39, 115 N.W.2d 618 (1962), wherein the supreme court held that "henceforward, so far as governmental responsibility for torts is concerned, the rule is liability—the exception is immunity." ***Milwaukee Metro. Sewerage Dist. v. City of Milwaukee***, 2005 WI 8, ¶53, 277 Wis. 2d 635, 691 N.W.2d 658. Although the supreme court in ***Holytz*** adopted a general rule of liability, it retained an exception to liability for acts done "in the exercise of its legislative or judicial or quasi-legislative or quasi-judicial functions," which was subsequently codified in § 893.80(4). *See* ***Holytz***, 17 Wis. 2d at 40.

¶7 Following ***Holytz*** and the codification of WIS. STAT. § 893.80(4), our supreme court has interpreted the legislative, quasi-legislative, judicial and quasi-judicial functions collectively as "includ[ing] any act that involves the exercise of discretion and judgment.'" ***Milwaukee Metro. Sewerage Dist.***, 277 Wis. 2d 635, ¶54 (quoting ***Lodl v. Progressive N. Ins. Co.***, 2002 WI 71, ¶21, 253 Wis. 2d 323, 646 N.W.2d 314). Thus, as the law presently stands, governmental bodies are immune from liability for any acts involving the exercise of discretion or judgment. *See* ***Noffke v. Bakke***, 2009 WI 10, ¶41, 315 Wis. 2d 350, 760 NW.2d 156. The supreme court has acknowledged that the effect of jurisprudence since ***Holytz*** has effectively been an abrogation of the general rule of liability adopted in ***Holytz***. *See* ***Pries v. McMillon***, 2010 WI 63, ¶17, 326 Wis. 2d 37, 784 N.W.2d 648. At the current time, the focus of an inquiry into a governmental

body's liability is on whether an exception to immunity applies.[4] *See, e.g.*, ***id.***, ¶19.

¶8 As relevant here, there is no immunity for acts associated with "(1) the performance of ministerial duties imposed by law; [and] known and compelling dangers that give rise to ministerial duties on the part of public officers or employees." ***Noffke***, 315 Wis. 2d 350, ¶42. Whether an exception to immunity applies presents a question of law, which we also review de novo. ***Pries***, 326 Wis. 2d 37, ¶19.

A. Ministerial Duty Imposed by Law

¶9 The Larsens contend that Portage County is not immune from liability in this case because the County violated a ministerial duty imposed by Wisconsin's safe-place statute, WIS. STAT. § 101.11(1), and by WIS. ADMIN. CODE § SPS 332.21 (Dec. 2013). The Larsens assert that § 101.11(1) and § SPS 332.21 required the County to take action to remedy the slippery condition on the floor and that because Portage County did not follow this requirement, the County violated a ministerial duty imposed by law.

[4] The Larsens suggest that the law is moving toward recognizing that "routine maintenance or custodial tasks" are not a legislative, quasi-legislative, judicial or quasi-judicial function as defined by recent supreme court cases, and argue that the current state of the law on immunity is "unworkable and should be discarded." However, we are not free to "discard" controlling law. We observe that some members of the supreme court question the direction that court's jurisprudence has taken with respect to immunity since ***Holytz.*** There have been calls by members of the supreme court to undertake a thorough review of the current approach to the law of immunity and to possibly alter the way in which immunity cases are decided in the future. *See, e.g.*, ***Bostco LLC. v. Milwaukee Metro. Sewerage Dist.***, 2013 WI 78, 350 Wis. 2d 554, 835 N.W.2d 160 (Gableman, J., concurring; Abrahamson, C.J., and Bradley, J., dissenting); and ***Pries v. McMillon***, 2010 WI 63, 326 Wis. 2d 37, 784 N.W.2d 648 (Abrahamson, C.J., concurring; Bradley, Roggensack and Gableman, JJ., dissenting). In any event, we are bound by the law as it now stands and any modification to the law of immunity must be undertaken by the supreme court.

¶10 A ministerial duty is one that has been "'positively imposed by law, and its performance required at a time and in a manner, or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon … judgment or discretion.'" ***Lodl***, 253 Wis. 2d 323, ¶26 (quoted source omitted). The duty is one that is "'absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion.'" ***Umansky v. ABC Ins. Co.***, 2009 WI 82, ¶15, 319 Wis. 2d 622, 769 N.W.2d 1 (quoted source omitted). The supreme court has observed that many governmental actions, even those done pursuant to a statutory mandate, qualify as discretionary because they implicate some discretion. ***Scott v. Savers Prop. & Cas. Ins. Co.***, 2003 WI 60, ¶28, 262 Wis. 2d 127, 663 N.W.2d 715.

¶11 To determine whether a written law or policy establishes a ministerial duty, we look to the language of the writing to determine whether the duty is "expressed so clearly and precisely, so as to eliminate the official's exercise of discretion." ***Pries***, 326 Wis. 2d 37, ¶26. In the present case, we conclude that neither WIS. STAT. § 101.11(1), nor WIS. ADMIN. CODE § SPS 332.21 is so absolute, certain and imperative in setting forth the manner in which the public building is to be maintained in a safe manner, that their directives are not dependent upon the exercise of discretion or judgment. *See* ***Umansky***, 319 Wis. 2d 622, ¶17. Thus, neither meets the requirements for a ministerial duty.

¶12 We address first whether Portage County had a ministerial duty under WIS. STAT. § 101.11(1). Section 101.11(1) sets forth an employer's duty to furnish safe employment and place for its employees. It provides:

> Every employer shall furnish … a place of employment which shall be safe for employees therein and for frequenters thereof and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees and frequenters. Every employer and every owner of a place of employment or a public building now or hereafter constructed shall so … repair or maintain such place of employment or public building as to render the same safe.

¶13 In ***Spencer v. County of Brown***, 215 Wis. 2d 641, 651, 573 N.W.2d 222 (Ct. App. 1997), we held that the duty imposed under WIS. STAT. § 101.11 is discretionary, not ministerial. ***Spencer*** concerned in part whether a county and sheriff were immune from suit for injuries an inmate sustained when he slipped and fell in the shower area. ***Id.*** at 644. Spencer argued that the defendants had a ministerial duty under § 101.11 to make the shower safe and were thus not immune from liability.[5] ***Id.*** at 649. Addressing whether § 101.11 imposed a ministerial duty to make the shower at issue safe, we explained that under § 101.11, the defendants were "required to use *reasonably adequate methods* to make the shower area safe, and to do every other thing *reasonably necessary* to protect" Spencer and others like him. ***Id.*** at 651. We concluded that although § 101.11 imposed a duty on the defendant to maintain safe premises, the language of § 101.11 "implies the exercise of discretion and judgment … in determining what measures are reasonably necessary" to do so, and thus the duty is not ministerial. ***Id.***

[5] We assumed, without deciding, in ***Spencer v. County of Brown***, 215 Wis. 2d 641, 649, 573 N.W.2d 222 (Ct. App. 1997), that WIS. STAT. § 101.11 applies to prison facilities.

¶14 The Larsens argue that our holding in ***Spencer*** is not binding in this case because the task needed to be performed to make the floor safe here "was a routine or mundane maintenance task." We are not persuaded that determining what measures are reasonably necessary to maintain the floor of the Portage County court house in a safe manner, as required by WIS. STAT. § 101.11, requires any less discretion or judgment than that required for maintaining a prison shower floor in a safe condition. ***Spencer*** is thus not distinguishable in any meaningful manner. Accordingly, we conclude that the County's duty under WIS. STAT. § 101.11 was discretionary, not ministerial.

¶15 We next address whether Portage County had a ministerial duty under WIS. ADMIN. CODE § SPS 332.21. Section SPS 332.21 provides: "No person may work on the surface of any structural member, floor, or other working platform which has become slippery from ice, snow, frost, paint or other cause, unless the surface is cleaned, sprinkled with sand or made nonslippery insofar as the nature of the work will permit." The Larsens argue that under § SPS 332.21, Portage County had a ministerial duty to either clean the slippery area of the floor where Barbara fell or sprinkle it with sand. For purposes of deciding the issue of immunity in this case we will assume without deciding that § SPS 332.21 applies in this situation.[6]

¶16 Under WIS. ADMIN. CODE § SPS 332.21, an employee is not permitted to work on a floor that has become slippery unless the floor "is cleaned, sprinkled with sand or made nonslippery insofar as the nature of the work will

[6] Although the issue is not raised by the parties, we question whether Barbara was "work[ing]" on a slippery surface within the meaning of WIS. ADMIN. CODE § SPS 332.21.

permit." As we discuss below, the language of § SPS 332.21 implies the exercise of judgment and discretion in determining what measures are to be taken, and under what circumstances. Section SPS 332.21 does not impose a duty to perform an act with such specificity as to time, mode and occasion that nothing remains for judgment and discretion.

¶17 The Larsens rely on ***Umansky***, 319 Wis. 2d 622, for the proposition that WIS. ADMIN. CODE § SPS 332.21 leaves nothing to judgment and discretion. In ***Umansky***, the supreme court held that under a relevant federal safety regulation, the director of facilities for Camp Randall Stadium had a ministerial duty to install a railing on a platform from which Richard Umansky fell, and thus was not immune from liability. ***Id.***, ¶¶1-4. The regulation in ***Umansky*** required that every open-sided platform that stood four feet above the ground be guarded by a specified railing. ***Id.***, ¶16. The supreme court held that the "highly specific safety regulation" at issue created a ministerial duty on the part of the facilities director to install a specific railing on the platform. ***Id.***, ¶¶17-18. The supreme court observed that the regulation did "not allow for the option of no railing in [those] circumstances and the regulation [was] very specific as to what type of railing [was] required." ***Id.***, ¶¶17-18.

¶18 The Larsens argue that there is "no meaningful distinction" between the safety regulation at issue in ***Umansky*** and WIS. ADMIN. CODE § SPS 332.21 because § SPS 332.21 created a ministerial duty on the part of Portage Country to make the floor nonslippery by either cleaning the floor or sprinkling the floor with sand. We disagree. The regulation at issue in ***Umansky*** specified that a specific type of railing was required to be installed on the platform, leaving nothing to be decided by the athletic directors. Section SPS 332.21, in contrast, does not provide a specific action that is required to be taken in the event a surface is

slippery. Rather, § SPS 332.21 provides that the employer would choose whether to clean the surface, sprinkle it with sand, or make the surface "nonslippery insofar as the nature of the work will permit," which leaves entirely within the discretion and judgment of the County the manner in which a slippery surface is to be made nonslippery. Accordingly, we conclude that § SPS 332.21 did not impose a ministerial duty on the part of the County.

B. Ministerial Duty Arising out of a Known and Compelling Danger

¶19 The Larsens also contend that the condition of the floor at the time Barbara fell qualifies for the known and compelling danger exception to government immunity.

¶20 The known and compelling danger exception arises when "'there exists a known present danger of such force that the time, mode and occasion for performance [are] evident with such certainty that nothing remains for the exercise of judgment and discretion.'" ***Lodl***, 253 Wis. 2d 323, ¶38 (quoted source omitted). For the known and compelling danger exception to apply, the circumstances must be "sufficiently dangerous so as to give rise to a ministerial duty—not merely a generalized 'duty to act' in some unspecified way, but a duty to perform the particular act upon which liability is premised." ***Id.***, ¶45. Under this exception, there is a ministerial duty to do a particular act in a particular time and manner that arises "not by operation of law … but by virtue of particularly hazardous circumstances" that are both known and "sufficiently dangerous to require an explicit, non-discretionary municipal response." ***Id.***, ¶39. "To qualify as ministerial, the time, mode, and occasion for performance of the duty must be so certain that discretion is essentially eliminated.... A ministerial duty, by definition, is explicit as to time, mode, and occasion for performance, and does not

admit of any discretion." ***Id.***, ¶¶40, 44. The application of the known and present danger exception to immunity is by nature "case-by-case." ***Id.***, ¶38.

¶21 In the present case, we conclude that even assuming that there was a danger to Barbara as she walked over the portion of the floor where her fall occurred,[7] it was not so certain and immediate as to impose a duty on Portage County to act immediately in one particular, non-discretionary way. The danger resulting from a slippery floor is not so unusual that immediate action to correct the danger was required by those observing the condition. Thus, while a Portage County employee observing the condition could have taken immediate steps to clean up the slick area where Barbara fell or place a warning sign or mark off the area, a Portage County employee observing the condition could have also reasonably taken note of the condition and reported it to the individual or individuals in charge of maintaining the premises. Accordingly, we conclude that the danger of Barbara being injured while walking over the slippery area of the floor was not so certain and immediate as to give rise to "a self-evident, particularized, and non-discretionary" duty to take only one immediate course of action. *See* ***Lodl***, 253 Wis. 2d 323, ¶40.

CONCLUSION

¶22 For the reasons discussed above, we conclude that Portage County is immune from liability and we affirm the order of summary judgment.

By the Court.—Order affirmed.

[7] Portage County asserts that it was disputed whether the floor was slick where Barbara fell and whether the County knew of the slick spot before Barbara fell, so as to establish that a known and compelling danger existed.

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