COURT OF APPEALS
DECISION
DATED AND FILED

October 16, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2772 **Cir. Ct. No. 2012CV276**

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

ESTATE OF ADRIANNA SEROY BY BARBARA SWEENEY, ZACHARY A. SEROY, DHAKARI G. SEROY AND DEONTE T. SEROY,

PLAINTIFFS-RESPONDENTS,

V.

ALEXANDRA LEUCK,

DEFENDANT,

MONROE COUNTY AND WISCONSIN COUNTIES MUTUAL INSURANCE CORPORATION,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Monroe County: TODD W. BJERKE, Judge. *Reversed and cause remanded*.

Before Blanchard, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Monroe County and its insurer Wisconsin County Mutual Insurance Corporation (collectively, the County or jail personnel) appeal an order that denied the County's summary judgment motion to dismiss a negligence claim brought against it by the Estate of Adrianna Seroy and by the individuals Zachary Seroy, Dhakari Seroy, and Deonte Seroy (collectively, the Estate). For the reasons discussed below, we conclude that the circuit court should have granted summary judgment in the County's favor on the grounds of governmental immunity. Accordingly, we reverse the summary judgment order and remand with directions that the court dismiss the negligence action against the County.

BACKGROUND

¶2 It is undisputed that Adrianna Seroy died from an overdose of mixed prescription medications while in the custody of the Monroe County Jail, and that Seroy obtained many of the drugs in her system from another inmate, Alexandra Leuck, who had smuggled them into the jail. For the purpose of this opinion, we accept the additional following facts alleged by the Estate to be true.

¶3 Seroy was in jail as a condition of probation on one case, while also facing drug-related charges in a second case. The County was aware that Seroy had a history of drug dependency, and it dispensed multiple medications to her in jail. Seroy did not have work release privileges, but due to overcrowding was housed in a cell adjacent to Leuck, who did.

¶4 Just over a month before Seroy's death, Leuck failed a drug test for morphine, resulting in a suspension of her work release privileges. The County conducted searches of Leuck's cell and residence, but did not discover any drugs. About a week before Seroy's death, a confidential informant provided police and

the jail administrator with information that Leuck had brought Xanax pills into the jail by "crotching" them, and had also used heroin while in the jail. Jail personnel conducted another search of Leuck's cell that day, but again found nothing, and a judge directed that Leuck's work release privileges be reinstated. The jail administrator orally advised several other jail personnel that Leuck would need to be watched once she resumed work release, but did not issue any written directives to that effect.

¶5 The evening that Seroy overdosed, Leuck returned more than an hour late from her reinstated work release. Jail personnel did not ask Leuck why she was late and, as on multiple prior occasions when Leuck had returned late, did not impose any discipline for the infraction. Jail personnel permitted Leuck to interact with other inmates in a waiting area until an officer was available to perform a strip search on Leuck as she changed from her street clothes to prison attire. The jailor who conducted the search had Leuck strip off all of her clothing but her bra and socks, but did not have her bend over and spread her buttocks, did not perform a cavity search, and did not search her purse.

¶6 Upon returning to the cell block, Leuck and Seroy got together in one of the cells, contrary to jail rules, and proceeded to ingest a significant amount of prescription medication, including numerous Xanax pills, that Leuck had just smuggled in by hiding them in a condom in her vagina.

¶7 Later that evening, suspecting that Leuck might have been using a cell phone, a jail employee searched the purse Leuck had left in her work release locker and discovered several contraband items, including cash over the amount inmates are allowed to have, a lighter, and a razor, as well as a receipt for prescriptions that had been filled that morning, including the Xanax. Leuck claimed that she had left the prescription medication at home, which violated a jail

rule about having all inmate prescriptions dispensed by the jail. The jail employee reported the discovery of contraband and evidence that Leuck had filled a prescription outside of the jail to a shift supervisor, who decided that no additional search or disciplinary action would be taken. The jail employee then disposed of the contraband items and advised Leuck to bring in the pills from her prescription the following day.

¶8 Fearing that an additional search might be made, Leuck gave Seroy her entire stash of pills to hide until after lockdown, when she asked to have them back. Throughout the night, jail personnel made routine patrols of the cells, but did not notice that Seroy was in distress. The following morning, Leuck found Seroy unresponsive and blue in the face, with her head on the end of her cot toward the back of the cell and covered by a blanket, also contrary to jail rules.

STANDARD OF REVIEW

¶9 This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court. ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503. The legal standard is whether there are any material facts in dispute that entitle the opposing party to a trial. ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶24, 241 Wis. 2d 804, 623 N.W.2d 751. We view the materials in the light most favorable to the party opposing the motion. ***Id.***, ¶23.

DISCUSSION

¶10 Municipalities and their public officials are generally shielded from liability for injuries resulting from the negligent performance or omission of acts

taken within the scope of public office. WIS. STAT. § 893.80(4) (2011-12);[1] *see also* ***Santiago v. Ware***, 205 Wis. 2d 295, 338, 556 N.W.2d 356 (Ct. App. 1996). This governmental immunity doctrine is qualified by several exceptions, however. Immunity is not available: (1) if the conduct was malicious, willful, and intentional, (2) if the conduct involved a non-discretionary, ministerial duty imposed by law; (3) if there existed a known present danger of such force that the time, mode, and occasion for performance left no room for the exercise of judgment; or (4) if any discretion involved was non-governmental in nature. ***Kierstyn v. Racine Unified Sch. Dist.***, 228 Wis. 2d 81, 90-100 & n.8, 596 N.W.2d 417 (1999). Thus, a governmental immunity analysis presumes the existence of negligence, and focuses on whether the act or omission upon which liability is premised falls within one of the judicially established exceptions. ***Lodl v. Progressive N. Ins. Co.***, 2002 WI 71, ¶17, 253 Wis. 2d 323, 646 N.W.2d 314.

¶11 Applying that analysis here, we start with the presumption that the County was negligent. More specifically, we presume that the County failed to use reasonable care to prevent the presence of contraband drugs in the jail and to monitor its inmates, causally contributing to Seroy's death.[2] The question then becomes whether the County can be held liable for its presumed negligence because one or more of the specific actions the Estate contends the County should have taken to prevent Leuck from smuggling drugs into the jail and providing them to Seroy, or to discover the overdose in time to save Seroy, was ministerial

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

[2] The parties spend portions of their briefs discussing evidence relating to whether the County violated its standard of care and how its actions or omissions were a cause of Seroy's death. We need not address those points, since we presume negligence.

in nature and/or was required to be taken in response to a known present danger.[3] We address each exception in turn.

Ministerial Duties

¶12 A ministerial action or 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." ***Pries v. McMillon***, 2010 WI 63, ¶22, 326 Wis. 2d 37, 784 N.W.2d 648. Where a duty is defined by a law or written policy, courts look to the language of the written material to determine whether its parameters are expressed so clearly and precisely as to eliminate any exercise of discretion on the public official's part. ***Id.***, ¶26. There are situations in which a public official has discretion whether to act, but once a decision to act has been made, the official must comply with mandatory directives regarding how the action should be performed. *See* ***id.***, ¶30 (citing ***Chart v. Dvorak***, 57 Wis. 2d 92, 203 N.W.2d 673 (1973)).

¶13 Here, the Estate contends that jail personnel failed to comply with a number of procedures set forth in the jail's policy manual regarding how strip searches and cell checks are to be conducted, and how discipline should be imposed for rule infractions. The Estate specifically challenges: the County's failure to search Leuck's purse upon her return from work release; its failure to direct Leuck to bend over and spread her buttocks during the strip search; its failure to discipline Leuck for returning late from work release, having contraband

[3] We do not address the first or fourth exception, because the Estate does not argue that either apply.

in her purse, and filling a prescription outside of the jail; and its failure to direct Seroy to comply with rules requiring her to sleep with her head uncovered and toward the side of cell closest to the door, in order to verify her identify and well-being during nighttime lockdown cell checks. The Estate points to the following written provisions to establish that the omitted actions constituted ministerial duties.

¶14 Monroe County Jail Policy 211, which provides guidelines for strip searches, states in relevant part:

> **POLICY**
>
> In order to ensure safety and security of inmates and staff and to prevent the introduction of contraband, strip searches will be performed as necessary on sentenced inmates, including Huber Law inmates.
>
> ….
>
> **PROCEDURES**
>
> ….
>
> **B. SEARCH GUIDELINES**
>
> ….
>
> 7. Inspect the rectum. Ask the person to bend over and spread their buttocks. If contraband is suspected or observed you may need to consider a cavity search.
>
> 8. Inspect the vagina of a female in a similar fashion.
>
> ….
>
> 11. Following the search of the person, carefully examine each article of clothing before returning them to the searched person.

The strip search report form that jail personnel are required to fill out when conducting a strip search contains corresponding directions that:

> The Jail Officer shall read aloud to the prisoner to be searched the following: (read as appropriate, cross out what was not read, write in anything added and record any responses.)
>
> ….
>
> … PLEASE STAND ERECT WITH YOUR FEET APART AND ARMS EXTENDED OUTWARD. (The Jail Officer shall inspect the following for contraband or health and safety danger.)
>
> ….
>
> (d) … Groin and buttocks, say: BEND OVER AND SPREAD YOUR BUTTOCKS;

¶15 Monroe County Jail Policy 111, which provides guidelines for cell checks, states in relevant part:

> **POLICY:** It is the policy of the Monroe County Jail (Jail) to conduct physical inspections (cell checks) of inmates of the Jail at frequent and irregular intervals, during the day or night, to ensure that inmates are in custody and are safe.
>
> ….
>
> **PROCEDURES:**
>
> ….
>
> 4. **Observation/Interaction:** Jail personnel conducting a cell check shall visually observe each inmate in his/her respective housing area.…
>
> ….
>
> 7. **Miscellaneous Cell Check Responsibilities:** When performing cell checks, jail personnel shall, in addition to the check of each individual inmate for personal security and safety, make observations regarding the following:
>
> ….
>
> b. Existence of contraband;
>
> ….
>
> d. Rule violations;

> ….
>
> 8. **Reporting:** Jail personnel shall make a log entry documenting the occasion(s) of cell checks … [and] shall also log any notable observations made during the checks. (NOTE: The officer in charge of the shift shall determine if any such notable observations should be referred to other entities and, if so, shall cause such referral to occur.)

¶16 Monroe County Jail Policy 213, which provides guidelines for imposing inmate discipline, states in relevant part:

> **Purpose:**
>
> To ensure compliance with Wisconsin Department of Corrections (DOC) standards and Wisconsin State Statute, the Monroe County Jail will provide a fair and impartial administration of inmate discipline. Monroe County shall try to resolve violations as quickly as possible while ensuring procedural due process rights of inmates.
>
> ….
>
> **Procedure:**
>
> Minor Rule Violation:
>
> 1. Behavior by an inmate that would result in a minor rule violation shall be first handled through verbal corrective action or counseling when appropriate.
>
> 2. If staff determines that the situation cannot be adequately handled verbally, progressive disciplinary sanctions may be imposed.…
>
> ….
>
> 3. Upon complete documentation of the incident, a copy of the discipline shall be forwarded to the Shift Sergeant, or in the Sergeant's absence, the Jail Administrator for review. The Shift Sergeant or Jail Administrator will then determined if the sanction(s) imposed were appropriate, upgrade or downgrade or dismiss the action.…
>
> Major Rule Violation:
>
> 1. Upon discovery of a major rule violation, the incident should be properly documented ….

> ….
>
> 2. Upon documentation of the incident, the disciplinary form shall be forwarded to the Shift Sergeant [or Jail Administrator, who] will review the documentation and determine if there are grounds for a hearing.

¶17 Having reviewed these provisions, we are not persuaded that they proscribe and define the time, mode, and occasion for any of the specific actions the Estate contends the jail officials should have taken with such certainty as to preclude any discretion on their part.

¶18 First, as to searching Leuck's purse prior to her reentry into the cell area of the jail, we note that the purse was not returned to Leuck to take into the cell area of the jail, but rather placed in her locker in the changing room, where she would have no access to it until her next release period. Additionally, the Estate does not point to anything in the materials to establish that the purse was an "article of clothing," so as to fall within the scope of the strip search pursuant to Section B.11 of Policy 211. Rather, a separate search of Leuck's stored belongings could be conducted whenever staff had time and/or specific reason to do so—as was in fact done later that evening. In other words, we do not see how the timing of the search of Leuck's purse was dictated by any of the jail procedures identified by the Estate.

¶19 Second, we agree with the Estate that, regardless whether jail officials were required to perform a strip search on all returning work release inmates, once the decision to conduct a strip search was made, jail personnel are required to comply with any mandatory procedures for doing so. We further acknowledge that the provision of guidelines and a specific script for jail personnel to use in conducting strip searches—including an explicit directive for jail officers to ask inmates to bend over and spread their buttocks—is suggestive

of a mandatory procedure. However, the view that the directive is absolute is undermined by the additional statement on the search form indicating that jail personnel may "read [portions of the script] as appropriate [and] cross out what was not read." That is, and pertinent here, the form contemplates that jail personnel may choose to ignore "BEND OVER AND SPREAD YOUR BUTTOCKS" because personnel may deem the procedure unnecessary.

¶20 We therefore conclude that the search guidelines are more flexible than the Estate contends. There is room for some discretion in what a jail employee says and how the jail employee inspects an inmate's body, depending on case-by-case circumstances that may make a more intrusive search appropriate in some instances and not others. To the extent that the Estate contends that the circumstances here—such as the allegations that Leuck had recently tested positive for drugs and that an informant said she had been smuggling prescription medications into the jail—warranted a more intrusive search, we note that these factors serve to highlight the case-by-case nature of the determination that is the hallmark of discretion.

¶21 Third, the procedures set forth for imposing discipline for minor and major rule violations in the jail are designed to ensure due process for inmates. They do not require that discipline be imposed—much less any specific measure of discipline—for each and every offense observed. To the contrary, the rules plainly contemplate that jail officials will have a wide range of informal as well as formal responses available to deal with rule violations, depending on the staff's perception of the severity of the offenses and the relative utility of various responses. We see nothing in the materials presented that would show jail officials violated specific procedures by confiscating the contraband found in Leuck's purse and directing her to bring in her prescription the following day

without seeking to impose sanctions, or by overlooking her late returns from work release or other infractions they deemed relatively minor. The proposition that jail officials failed in their general duty of care to effectively enforce jail rules or to accurately assess the potential danger of certain conduct goes to the question of negligence, not immunity, and does not render any different actions that might have been taken to enforce jail rules ministerial in nature.

¶22 Finally, we agree that jail personnel did have a ministerial duty to conduct cell checks within specified time parameters, and to log any "notable observations" made during the checks. Again, however, the issue is not whether the actions taken by jail personnel were sufficient to satisfy the County's general duty of care to ensure the safety of inmates, but rather whether the time, mode, and occasion of any specific task the Estate alleges jail personnel failed to perform was mandatory. The jail policies did not specify any of the types of actions the Estate contends jail personnel should have taken during their rounds to ensure inmate safety and/or rule compliance, such as shining a flashlight on the face of each inmate, or pausing at each cell to visually observe the inmate was breathing, or waking up an inmate to order a proper sleeping position.

Known Present Danger

¶23 The known present danger exception to governmental immunity applies when an obviously hazardous situation exists and "'the nature of the danger is compelling and known to the officer and is of such force that the public officer has no discretion not to act.'" ***Pries***, 326 Wis. 2d 37, ¶23 (quoted source omitted). The action required must be both particularized and self-evident. ***Lodl***, 253 Wis. 2d 323, ¶40.

¶24 Here, the circuit court reasoned that "contraband in a jail presents an obvious danger" that the County had a ministerial duty to make "reasonable efforts" to prevent. We disagree with that analysis for several reasons.

¶25 First, although we agree that the presence of drugs or other contraband in jail present an obvious danger to inmates and staff, we do not agree that the *possibility* that an inmate might smuggle drugs into jail equates to an *existing* present danger that is compelling and known to the officer. Only when drugs have actually been discovered would their existence be known and the need to confiscate them become compelling and nondiscretionary.

¶26 Second, the standards for negligence and immunity are separate. The test for immunity is not whether "reasonable efforts" were made to satisfy a duty of care; it is whether specific, nondiscretionary acts were required in order to satisfy any such duty. The circuit court's formulation that the "obvious danger" require "reasonable efforts" to prevent simply begs the question: what are reasonable efforts?

¶27 Finally, even if we were to view the mere possibility of drugs being smuggled into jail as a known present danger, we do not agree that it is self-evident that "reasonable efforts" include requiring all inmates returning from work release to submit to strip searches in which they bend over while naked and spread their buttocks, or imposing formal sanctions for each and every rule violation made by inmates, in order to address that danger. There could be downsides to taking actions that inmates deem unduly invasive or harsh, potentially increasing resentment or hostility between inmates and staff adversely affecting safety. Balancing such concerns requires the exercise of discretion on a case by case basis, not particularized actions that must be taken in every situation.

¶28 Because we conclude that none of the exemptions to the immunity doctrine apply here, we reverse the order denying the County's motion for summary judgment and remand with directions that the circuit court dismiss the County from the lawsuit.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.