COURT OF APPEALS
DECISION
DATED AND FILED

July 13, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 98-1337

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

JUSTIN PICHLER, PAUL PICHLER AND JILL PICHLER,

PLAINTIFFS-APPELLANTS,

BLUE CROSS & BLUE SHIELD UNITED OF WISCONSIN, A WISCONSIN INSURANCE CORPORATION, PRIMECARE HEALTH PLAN, INC., A WISCONSIN HEALTH MAINTENANCE ORGANIZATION,

SUBROGATED-PLAINTIFFS,

V.

UNITED STATES FIRE INSURANCE COMPANY, A FOREIGN INSURANCE CORPORATION AND HAMILTON SCHOOL DISTRICT,

DEFENDANTS-RESPONDENTS,

BEN L. BLYTHERS, A MINOR, BY HIS GUARDIAN AD LITEM AND KATRINA M. GAMES,

DEFENDANTS.

APPEAL from an order of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

FINE, J. Justin Pichler and his parents, Paul and Jill Pichler, appeal from the trial court's order granting summary judgment in favor of the Hamilton School District, dismissing the Pichlers' complaint. We affirm.

I.

Justin Pichler was a seventeen-year-old student at Hamilton High School when he was attacked by a fellow student, Ben Blythers. It all started when, according to Justin's affidavit submitted to the trial court in opposition to the school district's motion for summary judgment, Justin "unintentionally brushed against Blythers" in art class. Blythers took offense and, again according to Justin's affidavit, said: "'Don't ever do that again or I'm going to kick your ass.'" After the class, Justin was at his locker when Blythers, according to Justin, "tried to egg me into fighting and then he pushed me against the locker with his hands."

The confrontation was seen by a teacher, who asked Justin whether he wished to report the incident to school authorities. Justin said that he did, and told one of the school's associate principals, Roudell Kirkwood. Kirkwood spoke to the students separately and then suspended Blythers.[1] Under the school's rules, a suspended student is removed from classes, and a parent is contacted to take the

[1] There is some dispute whether this initial suspension was for three or five days. Kirkwood's affidavit says that it was five days. He testified at his deposition, however, that it was for three days. Kirkwood's affidavit was "orally" amended during his deposition to reflect that Blythers's initial suspension was three days. It was, apparently, later increased to five days after the attack that underlies this lawsuit.

student home. Kirkwood was not able to reach Blythers's parents. He then called Blythers's grandmother, but she did not have a car and could not come to the school to get Blythers.[2] Kirkwood then called the sheriff's department to see if they would take Blythers home. They refused. Kirkwood also testified at his deposition that he would not transport students in his personal car because of potential "legal liability" if "something was to happen to that student while in my vehicle."

The high school does not permit students to leave the building during the school day unless they are accompanied by either the student's parent or someone designated by the parent. Accordingly, Kirkwood placed Blythers in the school's administrative office suite, which, apparently, included Kirkwood's office, for the duration of the school day. Blythers also ate his lunch there. According to Kirkwood, although there were "incidents" at the school involving Blythers—"a theft or something at the beginning of the year," and "there was maybe an incident where he had I think hit a student or pushed a student or something of that nature"—Blythers did not have a reputation in the school for either having problems or being troubled, and took the news of his three-day suspension calmly.

At the end of the school day, when the 2:20 p.m. bell rang, Blythers left the office suite, ostensibly to board a bus home. Before boarding the bus, however, he ran into Justin and beat him severely. Kirkwood testified at his deposition that "before the bell rang there was another student I needed to talk with that had been sitting down the hall." Before he left the office, Kirkwood told Blythers to remain: "I told him sit there I'll be right back; I want to talk to a

[2] Although Hamilton High School is in Sussex, Blythers lived in Milwaukee.

student." When Kirkwood returned, a school secretary in the office told him that Blythers had "left, went to go get on the bus."

The Pichlers sued the school district, alleging that the school was negligent in handling the Blythers incident. They asserted four claims of alleged negligence: (1) the school did not "send Blythers home as soon as he was suspended"; (2) the school did not "supervise Blythers properly"; (3) the school did not "warn Justin Pichler about the danger presented to him by Blythers"; and (4) the school "fail[ed] to protect Justin Pichler from physical attack." The trial court dismissed the action on summary judgment, ruling that the school district was immune from suit under § 893.80(4), STATS.

II.

Our review of the trial court's grant of summary judgment is *de novo*. *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). We must first determine whether the complaint states a claim. ***Ibid.*** If the complaint states a claim, we must then determine whether "there is no genuine issue as to any material fact" so that a party "is entitled to a judgment as a matter of law." *See* RULE 802.08(2), STATS.; ***Green Spring Farms***, 136 Wis.2d at 315, 401 N.W.2d at 820.

Section 893.80(4), STATS., provides, as material here:

> No suit may be brought against any ... political corporation, governmental subdivision or any agency thereof ... or against its officers, officials, agents or employes for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

Although the Pichlers attempt to ascribe other meanings to the terms "quasi-legislative" functions and "quasi-judicial functions" by reference to various

dictionaries, the terms "are synonymous with discretionary acts and governmental officers are entitled to immunity for such acts." ***Bauder v. Delavan-Darien School Dist.***, 207 Wis.2d 310, 313, 558 N.W.2d 881, 882 (Ct. App. 1996). "Ministerial acts, on the other hand, are not generally subject to immunity." ***Ibid.*** "A duty is ministerial 'only when it 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.'" ***Id.***, 207 Wis.2d at 314, 558 N.W.2d at 882 (quoted source omitted). Thus, for an example bearing on the nub of the Pichlers' claim here, a requirement that a public officer provide a safe environment does not make how that is done "ministerial" unless the danger is so clear and the solution so evident that the officer's obligation admits but one immediate course. *Compare* ***Ottinger v. Pinel***, 215 Wis.2d 266, 572 N.W.2d 519 (Ct. App. 1997) (duty to prevent prisoner from escaping did not permit imposition of liability for injuries caused by escaped prisoner) *and* ***Spencer v. County of Brown***, 215 Wis.2d 641, 573 N.W.2d 222 (Ct. App. 1997) (how to fulfill duty imposed by safe-place statute, § 101.11, STATS., is discretionary decision) *with* ***Cords v. Anderson***, 80 Wis.2d 525, 538–542, 259 N.W.2d 672, 678–680 (1977) (trail was so dangerous that state-park manager had "absolute, certain, or imperative duty to either place the signs warning the public of the dangerous conditions existing on the upper trail or to advise his superiors of the condition with a view toward adequate protection of the public") *and* ***Domino v. Walworth County***, 118 Wis.2d 488, 490–491, 347 N.W.2d 917, 918–919 (Ct. App. 1984) (fallen tree laying across road created "a duty so clear and absolute that it falls within the concept of a ministerial duty").

The undisputed record in this case reveals that Kirkwood was faced with a fairly minor incident; Justin Pichler reported that Blythers pushed him against

Justin's locker after the oral confrontation in class. Kirkwood suspended Blythers and removed him from class. Kirkwood also tried to find someone who would take Blythers home, and, when no one would, confined Blythers to the administrative office. There was nothing in either Blythers's demeanor or in anything that he said that could have alerted Kirkwood that Blythers was an evident, immediate threat to Justin. Indeed, Justin testified at his deposition that after he left Kirkwood's office he was not afraid that Blythers might attack him: "I figured if he really wanted to beat me up that bad, he would have did it in lunch because we were in the same lunch, so I kind of figured I was going to be safe from here on." Justin also testified that he did not ask for any special protection, that he did not call his parents to tell them that Blythers had pushed him or that he was afraid, and that he thought that the confrontation with Blythers was, basically, over. Although the Pichlers argue that the school should have warned Justin about the danger from Blythers, there is nothing in the summary judgment materials—or even in the allegations of the complaint—that indicates that, until Blythers attacked Justin after the school day was over, Justin's run-in with Blythers was anything other than a typical school confrontation—pushing and bluster. Kirkwood's assessment of the situation and the steps he took in light of that assessment were well within the ambit of the immunity afforded by § 893.80(4), STATS. "A party cannot work backwards from a consequence to create a duty that is 'absolute, certain and imperative.'" ***Kimps v. Hill***, 200 Wis.2d 1, 12, 546 N.W.2d 151, 157 (1996).

By the Court.—Order affirmed.

Publication in the official reports is recommended.

No. 98-1337(D)

SCHUDSON, J. *(dissenting).* Although this case is a close one, and although I respect the reasoning the majority offers, I reach a different conclusion.

Granting summary judgment, the trial court declared, "Here the policy as stated is that when a student is suspended and the administrative staff is unable to contact that student's parents during [its] school day, the student will be housed in the administrative offices during the balance of that school day and sent home at dismissal time." In their brief to this court, the Hamilton School District and its insurer state that they "do not dispute that the policy is as stated by the trial court." They also do not dispute that Ben Blythers was able to severely beat Justin Pichler in part because of the school's failure to supervise Blythers while he was being "housed in the administrative offices" in accordance with the policy.

Unquestionably, Associate Principal Kirkwood's decision to suspend Blythers was a discretionary one. I conclude, however, that once Mr. Kirkwood made that decision, his implementation of the school policy was ministerial. Nothing in the record suggests that Mr. Kirkwood had discretion to *not* house Blythers in the administrative offices, or *not* send him home. Once he suspended Blythers, Mr. Kirkwood was responsible for implementing the school policy, thus bringing this case closer to the themes of ***Cords v. Anderson***, 80 Wis.2d 525, 259 N.W.2d 672 (1977), and ***Domino v. Walworth County***, 118 Wis.2d 488, 347 N.W.2d 917 (Ct. App. 1984), than to that of ***Ottinger v. Pinel***, 215 Wis.2d 266,

572 N.W.2d 519 (Ct. App. 1997). Therefore, Mr. Kirkwood's alleged negligent failure to successfully implement the school policy is actionable.

Additionally, the Pichlers offer an intriguing argument. Under the exception recognized in ***C.L. v. Olson***, 143 Wis.2d 701, 422 N.W.2d 614 (1988), they contend that even if Mr. Kirkwood's implementation of the school policy was discretionary, the defendants would not be immunized because, in the supreme court's words, "there exists a known present danger of such force that the time, mode and occasion for performance is evident with such certainty that nothing remains for the exercise of judgment and discretion." ***Id.*** at 717, 422 N.W.2d at 620. Granted, the majority summarizes portions of the record suggesting that neither Mr. Kirkwood nor Justin Pichler expected Blythers to retaliate. Still, it is reasonable to infer that retaliation by a suspended student against the student perceived to be the cause of the suspension is "a known present danger" and, in fact, is one of the reasons for the school policy.

Accordingly, I respectfully dissent.