COURT OF APPEALS
DECISION
DATED AND FILED

July 28, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2810

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

DOUGLAS A., CAROLINE A., LINA A., A MINOR, AND IAN A., A MINOR, BY THEIR GUARDIAN AD LITEM, MICHAEL J. GANZER,

PLAINTIFFS-APPELLANTS,

V.

WINNEBAGO COUNTY, DENNIS WENDT AND WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Winnebago County: THOMAS S. WILLIAMS, Judge. *Affirmed*.

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. Douglas A., his wife Caroline A., and their two children, Lina A. and Ian A., appeal from a summary judgment dismissing their action against Winnebago County, the Winnebago County Department of Social

Services and social worker Dennis Wendt (collectively referred to as the WDSS). The sole issue on appeal is whether the WDSS is immune from liability for alleged negligence in placing Douglas's son, Brandon A., in Douglas's home or in failing to warn the family about Brandon's dangerousness. We conclude that it is and we affirm the judgment.

Douglas is the father of Brandon A., born on February 1, 1987. Douglas and Brandon's mother were not married and never resided together after Brandon's birth. Until July 1996, Brandon was in his mother's care and custody. Douglas exercised visitation rights with Brandon when possible.

The WDSS had contact with Brandon at various times while he resided with his mother.[1] When Brandon's mother was arrested on July 15, 1996, on a complaint that she had physically abused Brandon, Brandon was taken into custody by a WDSS intake worker as a child in need of protection or services. At Douglas's request, Brandon was placed with Douglas. Brandon remained there until placed in psychiatric care on August 14, 1996.

At the time of Brandon's placement in Douglas's home, Lina was nearly four years old and Ian was sixteen months old. The complaint alleges that while placed in Douglas's home, Brandon sexually abused and molested both Lina and Ian. It is alleged that the WDSS knew or should have known of Brandon's

[1] The parties detail the various contacts between the WDSS and Brandon and the parties debate the significance of those contacts in terms of what the WDSS and Douglas knew about Brandon's behavior. Douglas's family suggests that the WDSS records document incidents in which Brandon engaged in sexual violence and threatened young children with homicide, rape and sexual mutilation. The WDSS characterizes the contacts as involving "school incidents" of inappropriate sexual contact by Brandon which were reported not for investigative purposes but under a mandatory duty to report suspected child abuse. We do not find it necessary to detail the scope of the WDSS's contacts with Brandon.

dangerous tendencies and that it was negligent in placing Brandon in Douglas's home, in exposing Lina and Ian to Brandon's dangerous tendencies, in failing to warn Douglas's family of Brandon's dangerous tendencies and in failing to disclose information regarding Brandon's dangerous tendencies when specifically requested.

In reviewing the grant of summary judgment, we conduct a de novo review using the same methodology employed by the circuit court.[2] *See* ***Ottinger v. Pinel***, 215 Wis.2d 266, 272-73, 572 N.W.2d 519, 521 (Ct. App. 1997). "That methodology is well known, and we will not repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." ***Id.***

Whether the WDSS is immune under § 893.80(4), STATS.,[3] is a question of law which we review de novo. *See* ***Kimps v. Hill***, 200 Wis.2d 1, 8, 546 N.W.2d 151, 155 (1996). Immunity exists when the act or acts complained of are discretionary acts, that is, acts involving the exercise of discretion and judgment. *See* ***Kara B. v. Dane County***, 198 Wis.2d 24, 54, 542 N.W.2d 777, 790 (Ct. App. 1995), *aff'd*, 205 Wis.2d 140, 555 N.W.2d 630 (1996). There are three exceptions to the shield of immunity. First, if the public entity or employee

[2] Because our review is de novo, we need not address the argument that the circuit court misapplied the summary judgment methodology.

[3] Section 893.80(4), STATS., provides:

> No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employes nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employes for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

engages in malicious, willful or intentional conduct; second, if the public entity or employee negligently performs a ministerial duty; and, third, if the public entity or employee is aware of a danger that is of such a quality that the public officer's duty to act becomes absolute, certain and imperative. *See* ***Barillari v. City of Milwaukee***, 194 Wis.2d 247, 257-58, 533 N.W.2d 759, 763 (1995).

Douglas's family acknowledges that the "placement" aspect of their claims fall into a discretionary function of the WDSS. The family contends that because of the "equities" of the case the alleged other acts or omissions by the WDSS—exposure to a known danger, failure to warn of a known danger and failure to disclose requested information—cannot be discretionary acts.[4] We disagree.

Kara B. holds that the type of decisions and determinations made by social service agencies in the placement of children is within the type of governmental discretion to which immunity attaches. *See* ***Kara B.***, 198 Wis.2d at 58, 542 N.W.2d at 791-92. Like the social service agency in ***Kara B.***, the WDSS acted "within a framework of law and administrative rules" governing services to a child in need of protection. *See* ***id.*** The determinations made within that framework involved the "evaluation of public policies within a regulated framework." ***Id.*** (quoted source omitted). Thus, the WDSS enjoys immunity under § 893.80(4), STATS.

[4] Douglas's family cites cases from other jurisdictions in support of its claim that the equities of the case compel a finding that the WDSS was performing ministerial acts and therefore is not immune. The supreme court has warned against using the analyses that courts of other jurisdictions have used in public immunity cases. *See* ***Ottinger v. Pinel***, 215 Wis.2d 266, 278, 572 N.W.2d 519, 523 (Ct. App. 1997).

Douglas's family argues that the WDSS's immunity is dissipated by the "known danger" rule. *See* ***Cords. v. Anderson***, 80 Wis.2d 525, 541, 259 N.W.2d 672, 679-80 (1977). ***Cords*** recognizes that circumstances may exist "where … the nature of the danger is compelling and known to the [public] officer and is of such force that the public officer has no discretion not to act." ***C.L. v. Olson***, 143 Wis.2d 701, 715, 422 N.W.2d 614, 619 (1988).

The "known danger" in ***Cords*** was an objective physical danger. The family's claim here relies on a subjective assessment of Brandon's propensity for dangerousness. Subjective dangerousness does not constitute a known danger. *See* ***Barillari***, 194 Wis.2d at 261, 533 N.W.2d at 764 (known danger did not exist because police officers could not predict the behavior of a suspect from whom the victim sought protection); ***C.L.***, 143 Wis.2d at 723, 422 N.W.2d at 622 (known danger did not exist because parole agent's position involved a subjective and discretionary balance between the danger posed by a parolee and the treatment of the parolee-client); *see also* ***Ottinger***, 215 Wis.2d at 276-78, 572 N.W.2d at 522-23 (***Cords*** exception did not apply to jail guards' failure to make any effort to prevent the escape of an inmate).

Douglas's family argues for the first time on appeal that the record supports a reasonable inference that the WDSS intentionally concealed Brandon's history and therefore would not be entitled to immunity for intentional acts.[5] We generally will not review an issue raised for the first time on appeal. *See* ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145 (1980); *see also* ***First Nat'l***

[5] The family also appears to argue for the first time on appeal that the WDSS exercised "nongovernmental discretion" which is excepted from immunity. Our holding that the WDSS acted within a framework of law and administrative rules governing services to a child in need of protection or services disposes of this belatedly asserted argument.

Bank of Appleton v. Nenning, 92 Wis.2d 518, 541, 285 N.W.2d 614, 625 (1979) ("This court will not consider new grounds for relief which are not brought to the attention of the trial court."). Moreover, the family's contention that the WDSS acted intentionally is completely contrary to the position advanced in the circuit court—that the WDSS did absolutely nothing. Indeed, in support of its claim that the WDSS's conduct did not involve discretionary acts, the family argued that "nothing in the record suggests that the official in the case at bar considered alternative options, weighed the risks of acting a certain way or anything else evidencing discretion. They simply did nothing." Judicial estoppel prohibits a party from asserting in litigation a position that is contrary to, or inconsistent with, a position asserted previously in the litigation by that party. *See* ***Godfrey Co. v. Lopardo***, 164 Wis.2d 352, 363, 474 N.W.2d 786, 790 (Ct. App. 1991).

Finally, Douglas's family argues that public policy necessitates a finding of liability in this case. The WDSS contends that a finding of liability violates public policy because Brandon was Douglas's own child and placed with him by request. We do not reach the issue because we conclude ***Kara B.*** to be controlling. The court of appeals is only an "error correcting" court and should not set policy on issues adequately covered by existing precedent. *See* ***Cook v. Cook***, 208 Wis.2d 166, 188, 560 N.W.2d 246, 255 (1997); ***Deegan v. Jefferson County***, 188 Wis.2d 544, 559, 525 N.W.2d 149, 155 (Ct. App. 1994).

By the Court.—Judgment affirmed.

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