COURT OF APPEALS
DECISION
DATED AND FILED

June 29, 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. 98-3245-FT

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

SUSAN K. SCHEY,

PLAINTIFF-RESPONDENT,

V.

WISCONSIN COUNTY MUTUAL INSURANCE CORPORATION AND LANGLADE COUNTY,

DEFENDANTS-APPELLANTS,

WISCONSIN MUTUAL INSURANCE COMPANY,

DEFENDANT.

SHANNON SCHEY, BY JEFFREY T. JACKOMINO, HER GUARDIAN AD LITEM AND SUSAN K. SCHEY,

PLAINTIFFS-RESPONDENTS,

V.

WISCONSIN COUNTY MUTUAL INSURANCE CORPORATION AND LANGLADE COUNTY,

DEFENDANTS-APPELLANTS,

WISCONSIN MUTUAL INSURANCE COMPANY,

DEFENDANT.

APPEAL from an order of the circuit court for Langlade County: JAMES P. JANSEN, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

HOOVER, J. Langlade County and its insurer, Wisconsin County Mutual Insurance Corporation (the County), appeal a nonfinal order denying their motion for summary judgment based on immunity. The issue on appeal is whether a county work crew's decision regarding how to fell a tree, including whether to post warnings, is a discretionary act for governmental immunity purposes.[1] The County contends the circuit court erred by determining that its work crew's actions were ministerial, thus exposing the County to liability. We determine that the crew's initial decisions as to how to fell the tree and whether to post warnings were discretionary. The crew evaluated the risk and chose a method to fell the tree that they believed would alleviate any danger of the tree falling onto the road. Once the tree fell across the road, however, the crew had an absolute, certain and imperative duty to warn the public and remove the tree. Thus, we affirm denial of summary judgment of the entire action, reverse denial of summary judgment as to

[1] This is an expedited appeal under RULE 809.17, STATS. By order dated December 1, 1998, this court granted leave to appeal a nonfinal order.

the crew's decision regarding how to fell the tree and whether to post warnings initially, and remand for a determination whether the crew was negligent once the tree fell onto the road.

The County work crew was cutting several trees near a road to expand a gravel pit. The County had no established rules or regulations in place governing tree cutting near roads. The crew decided against posting warning signs or flagmen. Rather, it determined that it could safely fell the trees so as to not obstruct the road. The tree in question was leaning toward the road. According to the County, the tree was not "really big." The crew determined that it would fell the tree parallel to the road, hanging it up in an adjacent tree, and then use a bulldozer and chains to move the tree.

The foreman was watching for traffic "in case something did happen." When the tree was severed, it hit the adjacent tree but rolled off and fell, partially obstructing the road. The bulldozer came up, and one crew member started to wrap chains on the tree trunk. At that time, a vehicle occupied by Susan and Shannon Schey collided with the tree. The Scheys sustained personal injuries. The County crew testified that the collision occurred thirty to forty-five seconds after the tree fell.

The Scheys sued the County for their injuries resulting from its employees' alleged negligence. The County moved for summary judgment, asserting governmental immunity based on its contention that its employees' acts were discretionary. In denying the motion, the circuit court determined that because the crew's decision regarding how to cut the tree was ministerial and not discretionary, the County is not immune for its employees' negligent performance.

We review a summary judgment using the same methodology as the trial court. *See* ***M & I First Nat'l Bank v. Episcopal Homes Mgmt.***, 195 Wis.2d 485, 496-97, 536 N.W.2d 175, 182 (Ct. App. 1995). 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. *See* ***id***. Summary judgment presents a question of law we review de novo. *See* ***id***. at 497, 536 N.W.2d at 182. Whether a duty is ministerial is a question of law we review without deference to the circuit court.[2] ***Larsen v. Wisconsin Power & Light Co.***, 120 Wis.2d 508, 516, 355 N.W.2d 557, 562 (Ct. App. 1984).

The Scheys contend that the crew had a ministerial duty to cut the tree in such a fashion that it not obstruct or impede the road. For support, they rely on common and statutory law indicating that highways may not be obstructed unless signs are placed warning of the obstruction. They claim this authority imposed a clear duty upon the crew to keep highways clear of obstructions.

The Scheys also assert the County is not immune because: (1) its crew exercised nongovernmental discretion, *see* ***Scarpaci v. Milwaukee County***, 96 Wis.2d 663, 686-88, 292 N.W.2d 816, 827-28 (1980); and (2) there existed 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

[2] The circuit court based its decision, in part, on the distinction between planning and operation. That analysis is flawed. In ***Kimps v. Hill***, 200 Wis.2d 1, 24, 546 N.W.2d 151, 161 (1996), our supreme court declined to create a planning/operation distinction to be utilized in employee immunity analysis, noting the critical distinction remains whether the employees' acts are discretionary or ministerial. It also concluded that the planning/operational distinction was not helpful because employees in operational jobs routinely exercise judgment over a wide range of permissible courses. ***Id***. In any event, the Scheys have not argued on appeal the planning/operational distinction as a basis for imposing liability.

judgment and discretion. *See* ***Cords v. Anderson***, 80 Wis.2d 525, 541, 259 N.W.2d 672, 679 (1977).[3] We shall discuss each of these in turn after first addressing whether the crew's decision on how to cut the tree was discretionary or ministerial.

Under § 893.80(4), STATS., the County is immune from its employees' negligent "acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions." The test for determining whether immunity exists is whether the act is discretionary or ministerial. *See* ***Kimps v. Hill***, 200 Wis.2d 1, 10 n.6, 546 N.W.2d 151, 155 n.6 (1996). Public employees are immune from personal liability for injuries resulting from the negligent performance of a discretionary act within the scope of their public office. *See* ***Santiago v. Ware***, 205 Wis.2d 295, 338, 556 N.W.2d 356, 373 (Ct. App. 1996). Conversely, they are liable for the negligent performance of a ministerial duty. ***Kimps***, 200 Wis.2d at 10, 546 N.W.2d at 156.

A discretionary act is one that involves choice or judgment. ***Id***. at 23-24, 546 N.W.2d at 161. By contrast, 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

[3] There is some confusion whether a known present danger is an exception to the immunity rule or whether it creates a ministerial duty. In ***Barillari v. City of Milwaukee***, 194 Wis.2d 247, 258, 533 N.W.2d 759, 763 (1995), the supreme court noted that there are three exceptions to the general rule of immunity; it lists a known present danger as the third exception. In contrast, a year later in ***Kimps***, 200 Wis.2d at 15, 546 N.W.2d at 158, the supreme court explained that a known danger creates a ministerial duty. Here, we follow ***Kimps*** and address a known danger as a means to create a ministerial duty, but treat it separately from the initial discussion whether the act is discretionary or ministerial, as did the court in ***Kimps***. ***Id***. at 15-16, 546 N.W.2d at 158.

discretion." ***Lister v. Board of Regents***, 72 Wis.2d 282, 301, 240 N.W.2d 610, 622 (1976).

First, we agree with the County that the crew's initial decision how to fell the tree, including whether to post warnings, was discretionary. We cannot say that nothing remained for judgment or choice. *See* ***Kimps***, 200 Wis.2d at 23-24, 546 N.W.2d at 156. No manual, policy or law existed dictating how they should cut the tree. *See* ***Lister***, 72 Wis.2d at 301, 240 N.W.2d at 622. The crew was faced with a choice: attempt to fell the tree so as to not obstruct the road, or let it fall onto the road and warn the public of the danger. It chose the former because, in the crew's judgment, it believed the tree could be felled in such a manner that it would not block the road. This was discretion exercised. *See* ***Kimps***, 200 Wis.2d at 23-24, 546 N.W.2d at 156.

Next, we reject the Scheys' claim that the County crew exercised nongovernmental discretion and therefore is not protected by immunity. They assert the crew exercised discretion in the profession of tree cutting, not governmental discretion. We conclude that the professional exercise of nongovernmental discretion has been recognized as an exception to immunity only in the context of the exercise of medical discretion, which is inapplicable here.

The governmental versus nongovernmental distinction was recognized in ***Scarpaci***, in which our supreme court determined that the manner in which a county coroner performed an autopsy involved an exercise of medical nongovernmental discretion. ***Id***. at 686-88, 292 N.W.2d at 827-28. The Scheys invite us to extend the holding in ***Scarpaci*** to this situation. We decline. As this court has repeatedly held, ***Scarpaci*** is limited to the exercise of medical discretion. *See* ***Bauder v. Delavan-Darien Sch. Dist.***, 207 Wis.2d 310, 317, 558 N.W.2d 881,

883 (Ct. App. 1996) ("[T]his court has limited the ***Scarpaci*** exception to cases involving medical discretion."); ***Stann v. Waukesha County***, 161 Wis.2d 808, 818, 468 N.W.2d 775, 779 (Ct. App. 1991). No Wisconsin decision has applied this exception in any other setting, and we are bound by this court's previous decisions. ***Cook v. Cook***, 208 Wis.2d 166, 190, 560 N.W.2d 246, 256 (1997) ("[T]he court of appeals may not overrule, modify or withdraw language from a previously published decision of the court of appeals.").

Finally, we address whether the ***Cords*** analysis applies—that the danger is known and of such quality that the public officer's duty to act becomes absolute, certain and imperative. ***Id***. at 541, 259 N.W.2d at 679. The Scheys contend that the employees had a ministerial duty to post warning signs or close the portion of the roadway or post flagmen to keep a lookout for cars. They assert that a tree in the road created such a danger that the County employees had an absolute, certain and imperative duty. The County claims that ***Cords*** is distinguishable because the dangerous condition here, the tree on the roadway, did not exist until after the crew exercised its discretion by deciding how to fell the tree. We conclude that when the crew initially decided how to cut the tree, it did not have an absolute, certain and imperative duty to close the road or somehow warn of the danger; that duty, however, existed once the tree fell onto the road.

In ***Cords***, a state park manager was held liable for failure to warn of the dangerous condition posed by night hiking on a path inches from a ninety-foot drop. ***Id***. at 541-42, 259 N.W.2d at 679-80. The manager took no action concerning this danger. The court held that because the manager knew of the dangerous condition, his duty to alleviate the danger was clear and absolute, and therefore his failure to do so constituted a negligent omission to perform a ministerial duty. ***Id***.

We disagree with the Scheys that when the crew initially decided how to cut the tree there was a known danger of such a quality that a decision to close the road or somehow warn of the danger became absolute, certain and imperative. Unlike the manager in ***Cords***, the crew considered the *possible* danger of blocking the roadway but believed they could alleviate that concern by controlling the manner and direction of the tree's fall. The foreman also kept a lookout for vehicles "in case something did happen." The crew evaluated the situation, made a choice, and took action to alleviate a possible danger. We cannot say that the potential of danger here rose to such a degree of probability that nothing was left to the crew's decision. The crew believed they could fell the tree safely off the roadway and then quickly haul it away. They kept a lookout for vehicles but did not expect anything untoward.

We do, however, agree with the Scheys that *after* the tree fell onto the roadway, there arose a danger of such a quality that the crew's duty to act became absolute, certain and imperative. *See* ***Domino v. Walworth County***, 118 Wis.2d 488, 491-93, 347 N.W.2d 917, 919-20 (Ct. App. 1984). In ***Domino***, this court concluded that a dispatcher aware of a tree that had fallen across the roadway has an absolute, certain and imperative duty to alert appropriate personnel because the tree created a dangerous condition and falls within the ***Cords*** analysis. ***Id***. After the tree fell, the crew was obliged to remove it from the road and warn the public of the obstruction. *See* ***id***. Once the tree fell onto the road, whether the crew was negligent in connection with any action it took, or had time to take is a question for the jury to decide. *See* ***id***.

In summary, we determine that the County crew exercised discretion by initially evaluating whether to put up signs and how to cut the trees and choosing the method they believed would alleviate the danger of a tree falling onto

the roadway. Once the tree fell onto the roadway, the known danger was of such quality that the crew had an absolute, certain and imperative duty to warn of the danger and remove the danger from the road. The County is immune for any negligence of its crew up until the time the tree fell in the road, but not after. Accordingly we reverse the circuit court's decision in part and affirm in part. We remand the cause for proceedings consistent with this decision.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions. No costs on appeal.

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