COURT OF APPEALS
DECISION
DATED AND FILED

June 1, 2005

Cornelia G. Clark
Clerk of Court of Appeals

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* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP2465 Cir. Ct. No. 2003CV174

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

THOMAS G. NEJEDLO, ANGELA M. NEJEDLO, VINCENT T. NEJEDLO A MINOR, NICOLE M. SIMON, ASHLEY E. SIMON A MINOR, PATRICK T. RUSS, CHARLENE M. RUSS, REGINA C. RUSS A MINOR, BARRY L. TRUESDELL, GRACIE M. TRUESDELL, JENNIFER L. TRUESDELL A MINOR, JOSHUA L. TRUESDELL A MINOR, MICHELLE A. TRUESDELL A MINOR, JASON M. FERDON, DENISE S. FERDON, ALEXIS S. FERDON A MINOR, DANIEL L. GABRIEL, CARRIE L. GABRIEL, BRENNEN L. GABRIEL A MINOR, BETHANY L. GABRIEL ALL MINORS APPEARING BY THEIR GUARDIAN AD LITEM AND RICHARD H. SCHULZ,

PLAINTIFFS-APPELLANTS,

BLUE CROSS & BLUE SHIELD UNITED OF WISCONSIN, BADGER CARE STATE OF WISCONSIN, LINE CONSTRUCTION BENEFIT FUND AND EMERSON ELECTRIC HEALTH PLAN,

INVOLUNTARY-PLAINTIFFS,

V.

SCHOOL DISTRICT OF WAUSAUKEE AND EMPLOYER'S MUTUAL CASUALTY COMPANY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Marinette County: TIM A. DUKET, Judge. *Affirmed*.

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

¶1 PER CURIAM. Students, their parents and their subrogated insurers (collectively "Nejedlo")[1] brought this negligence action against the Wausaukee School District and its insurers. Nejedlo argues the trial court erroneously determined governmental immunity barred his claim and erroneously granted summary judgment of dismissal. Nejedlo contends that the court erred in failing to apply the following two exceptions to governmental immunity: (1) the school district's ministerial duty to maintain the school safely, and (2) the school district's duty to address a known danger. We affirm the judgment.

BACKGROUND

¶2 Nejedlo's complaint alleges that the school district was negligent in constructing, repairing and maintaining its school building, contrary to state statutes and administrative code provisions and, consequently, the students sustained injuries. The school district moved for dismissal on the basis of immunity under WIS. STAT. § 893.80.[2] Nejedlo filed an affidavit in opposition to the motion.

¶3 The affidavit included the following exhibits: (1) a 1999 MacNeil Environmental, Inc., report; (2) a 2002 letter to the school district from Michael's

[1] For economy, we refer to the appellants collectively as "Nejedlo."

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Engineering, Inc., along with a description of 2001 microbial samplings; (3) P&K Microbiology Services, Inc., 2002 report indicating high concentrations of fungi in certain areas; and (4) a 2002 Wisconsin Occupational Health Laboratory report indicating a high concentration of fungi in certain areas.

¶4 Nejedlo asserted that these exhibits demonstrated that the school district knew it had a mold problem in its schools as of October 1999 and that the problem continued through April 2002. He claimed the school district failed to present any evidence that it took action to remedy the problem. The circuit court granted the school district's motion and dismissed the action. Nejedlo's appeal follows.

STANDARD OF REVIEW

¶5 When reviewing a summary judgment, we perform the same function as the trial court and our review is de novo.[3] *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when no material facts are in dispute and the moving party is entitled

[3] The school district sought judgment on the pleadings. Because the trial court considered an affidavit filed outside the pleadings, it utilized summary judgment procedure under WIS. STAT. § 802.06(3), which provides:

> JUDGMENT ON THE PLEADINGS. After issue is joined between all parties but within time so as not to delay the trial, any party may move for judgment on the pleadings. …. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in s. 802.08, and all parties shall be given reasonable opportunity to present all material made pertinent to the motion by s. 802.08.

to judgment as a matter of law. *See* WIS. STAT. § 802.08. We will reverse a summary judgment if the trial court incorrectly decided a legal issue or if material facts were in dispute. ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993).

DISCUSSION

¶6 Wisconsin's governmental immunity statute, WIS. STAT. § 893.80(4), lies at the heart of Nejedlo's appeal.[4] This statute provides political subdivisions and public officials with immunity for acts done in the exercise of legislative, quasi-legislative, judicial, or quasi-judicial functions. ***Scott v. Savers Prop. & Cas. Ins. Co.***, 2003 WI 60, ¶15, 262 Wis. 2d 127, 663 N.W.2d 715.

> The doctrine of governmental immunity represents "a balance between the need of public officers to perform their functions freely [and] the right of an aggrieved party to seek redress." The doctrine reflects concern for "protection of the public purse against legal action and … the restraint of public officials through political rather than judicial means."

Id., ¶35 (quoting ***Kierstyn v. Racine Unified Sch. Dist.***, 228 Wis. 2d 81, 89-90, 596 N.W.2d 417 (1999)).

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[4] WISCONSIN STAT. § 893.80, entitled "Claims against governmental bodies or officers, agents or employees," reads in part:

> **(4)** 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 employees nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

¶7 Our supreme court has recognized limitations to governmental immunity for (1) ministerial duties imposed by law; (2) duties to address a known danger; (3) actions involving professional discretion; and (4) actions that are malicious, willful, and intentional. ***Id.***, ¶16.

¶8 Nejedlo does not dispute that absent an exception, WIS. STAT. § 893.80(4) would provide the school district with immunity. He argues, however, that his claims fall within two exceptions to the rule: (1) ministerial duties imposed by law and (2) the duty to address a known and present danger. Whether one or more exceptions apply presents a question of law. ***Lodl v. Progressive N. Ins. Co.***, 2002 WI 71, ¶17, 253 Wis. 2d 323, 646 N.W.2d 314. Based on the undisputed facts of record, we conclude that neither exception applies.

1. Ministerial Duty

¶9 Nejedlo argues that a ministerial duty is imposed under WIS. STAT. § 121.02(1)(i)[5] and WIS. ADMIN. CODE § PI 8.01(2)(i) (June 2004).[6] We disagree.

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[5] WISCONSIN STAT. § 121.02, "School district standards," requires each school district to "(i) Provide safe and healthful facilities. The facilities shall comply with ss. 254.11 to 254.178 and any rule promulgated under those sections." WISCONSIN STAT. §§ 254.11 to 254.178 govern lead abatement.

[6] WISCONSIN ADMIN. CODE § PI 8.01(2)(i) (June 2004), school district standards, provides:

> *Safe and healthful facilities*. A long-range plan shall be developed, adopted, and recorded by the school board which defines the patterns and schedule for maintaining the district operated facilities at the level of the standards established for safe and healthful facilities. The school board shall comply with all regulations, state codes, and orders of the department of commerce and the department of health and family services and all applicable local safety and health codes and regulations. The facilities shall be inspected at least annually for potential or demonstrated hazards to safety and health, and hazardous

(continued)

In ***Lodl***, our supreme court described the narrow definition of ministerial duties as follows: A public officer's 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." ***Lodl***, 253 Wis. 2d 323, ¶25 (citation omitted). It is "the categorization of the specific act upon which negligence is based and not the categorization of the overall general duties of a public officer which will dictate" whether WIS. STAT. § 893.80(4) provides immunity. ***Coffey v. City of Milwaukee***, 74 Wis. 2d 526, 533-34, 247 N.W.2d 132 (1976).

¶10 In ***Bauder v. Delavan-Darien Sch. Dist.***, 207 Wis. 2d 310, 314, 558 N.W.2d 881 (Ct. App. 1996), our supreme court rejected the proposition that because WIS. STAT. § 121.02(1)(i) required the school board to "provide safe and healthful facilities," the manner in which it was to carry out its duties was ministerial. ***Id.*** Thus, the ministerial duty exception to governmental immunity did not apply to a claim for injuries a student sustained while participating in a physical education class. ***Id.*** The court explained: "While the obligation to provide physical education classes is mandated, and thus ministerial, the manner in which those classes are conducted is not specified either by state statute or by the school district under the facts of this case." ***Id.***

> conditions shall be corrected, compensating devices installed or special arrangements made to provide for safe and healthful facilities. Maintenance procedures and custodial services shall be conducted in such a manner that the safety and health of persons using the facilities are protected. Responsibility for coordinating all activities related to the safety and health considerations of the facilities for the entire district shall be assigned to one individual.

¶11 A similar argument was rejected in ***Scott,*** where a code regulation specified regulations for schools' guidance and counseling services. Our supreme court held that neither WIS. STAT. § 121.02(1) nor WIS. ADMIN. CODE § PI 8.01(2)(e) created an absolute, certain or imperative duty that fell within the ministerial duty exception to governmental immunity. ***Scott***, 262 Wis. 2d 127, ¶¶26-29.

¶12 Here, while the school district's obligation to provide a safe and healthy facility is mandated, the manner in which the facility is constructed, repaired and maintained is not specified. "[M]any governmental actions, even those done under a legal obligation, qualify as discretionary because they implicate some discretion." ***Id.***, ¶28. The school district's decisions how to construct, repair and maintain the school building cannot be described as "a specific task" for which "the law imposes, prescribes, and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion." ***Lodl***, 253 Wis. 2d 323, ¶25.

¶13 Nejedlo claims, nevertheless, that the school district's duties are no more discretionary than the inspection duties described in ***Coffey***. We disagree. In ***Coffey***, our supreme court ruled that the City of Milwaukee was not immune from liability for negligent inspection of a building for code compliance. ***Coffey***, 74 Wis. 2d at 534-35. "There is no discretion to inspect or not inspect. … [t]he actual inspection as is involved here does not involve a quasi-judicial function." ***Id.***

¶14 In contrast, decisions regarding building construction, repair and maintenance require judgment and discretion on the part of the representatives of the district. "At first blush it might appear that the duty to keep the school grounds

'safe' is ministerial in character, but it is apparent on closer analysis that a great many circumstances may need to be considered in deciding what action is necessary to do so, and such decisions involve the exercise of judgment or discretion rather than the mere performance of a prescribed task." ***Meyer v. Carman***, 271 Wis. 329, 331-32, 73 N.W.2d 514 (1955); *see also* ***Kimps v. Hill***, 187 Wis. 2d 508, 528, 523 N.W.2d 281 (Ct. App. 1994) (Physical education teacher had no ministerial duty to tighten loose screws on a heavy volleyball pole stand.). While the school district has the obligation under statutory and administrative code sections to provide safe and healthy facilities, the measures it decides to undertake in satisfying its obligations are purely discretionary actions.

¶15 Nejedlo further contends that "if the school district did nothing to make its facilities safe and healthful, especially in light of its knowledge of a mold problem," it failed to satisfy its ministerial duty to do so. We disagree. Nejedlo's contention assumes that whatever the school district failed to do was not discretionary on its part. His argument fails to spell out, however, what action the school district was to have taken. Because Nejedlo fails to identify any "specific task" for which "the law imposes, prescribes, and defines the time, mode and occasion for its performance," *see* ***Lodl***, 253 Wis. 2d 323, ¶25, the school district's duties to remediate mold necessarily require its judgment or discretion. Because the immunity statute assumes negligence, ***id.***, ¶19, the school district's alleged negligence is irrelevant. The alleged negligent acts require the exercise of discretion and judgment and, therefore, are subject to the immunity defense under WIS. STAT. § 893.80(4).

2. Known and Present Danger

¶16 Nejedlo argues that the school district violated its duty to address a known present danger. "The 'known present danger exception' gets its genesis from ***Cords v. Anderson***, 80 Wis. 2d 525, 259 N.W.2d 672 (1977)." ***Bauder***, 207 Wis. 2d at 315. In ***Cords***, the plaintiff fell while hiking on a dangerous cliff-side trail. ***Cords***, 80 Wis. 2d at 535. Our supreme court held: There can be no "policy" to leave "obviously" dangerous conditions alone. ***Id.*** at 538. "The duty to either place warning signs or advise superiors of the conditions is, on the facts here, a duty so clear and so absolute that it falls within the definition of a ministerial duty." ***Id.*** at 542.

¶17 ***Cords*** presented a unique factual setting. At a recreational area, a park manager knew that a hiking trail came within inches of a ninety-foot gorge, yet placed no warning signs. ***Cords***, 80 Wis. 2d at 538. Our supreme court held that the park manager had a ministerial duty to either place warning signs or advise his superiors of the dangerous situation existing on the trail where one misstep would cause an uninterrupted twenty-foot slide down a sharp incline to a direct drop-off of approximately eighty feet to the rock bottom. ***Id.*** at 541. The court ruled that the manager, who knew the terrain was dangerous particularly at night and who was in a position to take action, was liable for breach of his duty to take appropriate precautions. ***Id.*** at 541-42.

¶18 Other cases that have applied this rule include ***Domino v. Walworth County***, 118 Wis. 2d 488, 490-91, 347 N.W.2d 917 (1984), in which a sheriff's dispatcher was found to have a ministerial duty with respect to warning motorists of a fallen tree that blocked a road. Also, in ***Lodl***, 253 Wis. 2d 323, ¶2, a passenger was injured in a vehicle that was struck broadside in an intersection

without operative traffic control signals during a storm. Our supreme court held that the situation at the intersection, while dangerous, was not a compelling and known danger of such force that it created a ministerial duty in the performance of traffic control. ***Id.***, ¶5.

¶19 We are unpersuaded that the duties presented in constructing, repairing and maintaining a building are analogous to the duties in the cases cited. The duties to construct, repair and maintain a building involve a greater degree of judgment and discretion than placing a sign, warning motorists of a fallen tree or directing traffic around inoperable control signals.

¶20 Nejedlo complains, however, that the court erroneously deprived him of the opportunity for additional discovery to determine "what the District knew, and what the District did." Nejedlo's request for additional discovery does not inquire as to the nature of the school district's duties, but rather the issue of negligence. Negligence is assumed for the purposes of the immunity defense. ***Id.***, ¶19. Because the immunity statute presupposes negligence, additional discovery regarding negligence would not address the school district's immunity defense. Therefore, because the immunity statute bars these claims, the judgment dismissing the claims is affirmed.

By the Court.—Judgment affirmed.

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