COURT OF APPEALS
DECISION
DATED AND FILED

October 15, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1281-FT **Cir. Ct. No. 2012CV245**

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

MARIAH YANG, BY HER GUARDIAN AD LITEM, JEFFREY M. BERZOWSKI AND KIRSTEN HANSON,

PLAINTIFFS-APPELLANTS,

MANAGED HEALTH SERVICES INSURANCE CORP. AND OUTAGAMIE COUNTY,

INVOLUNTARY-PLAINTIFFS,

V.

APPLETON AREA SCHOOL DISTRICT AND COMMUNITY INSURANCE CORPORATION C/O WISCONSIN COUNTIES ASSOCIATION,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Mariah Yang, by her guardian ad litem, along with Yang's mother, Kirsten Hanson (collectively, Yang), appeal a summary judgment dismissing Yang's personal injury claim against the Appleton Area School District and its insurer, Community Insurance Corporation.[1] Yang argues the circuit court erred by concluding the school district is entitled to governmental immunity. We reject Yang's arguments and affirm the judgment.

BACKGROUND

¶2 When in eighth grade, Yang was injured during a physical education class while attempting to retrieve a volleyball that had landed on the top of closed retractable bleachers. Yang fell and caught her pinky finger in a metal brace of the bleachers, severing the finger. Yang filed suit seeking damages for her injuries. The circuit court granted summary judgment in favor of the school district, concluding that the district is entitled to governmental immunity under WIS. STAT. § 893.80(4). This appeal follows.

DISCUSSION

¶3 This court reviews summary judgment decisions independently, applying the same standards as the circuit court. ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis. 2d 226, 232, 568 N.W.2d 31 (Ct. App. 1997). Summary judgment is granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987).

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶4 Whether the school district is immune from suit under WIS. STAT. § 893.80(4) is a question of law we review independently. *See* ***Kimps v. Hill***, 200 Wis. 2d 1, 8, 546 N.W.2d 151 (1996). The statute immunizes school districts, among other governmental units, from liability for acts that involve the exercise of discretion or judgment. *See* ***Noffke ex rel. Swenson v. Bakke***, 2009 WI 10, ¶41, 315 Wis. 2d 350, 760 N.W.2d 156. The governmental immunity doctrine is qualified by several exceptions. Relevant to this appeal, there is no immunity from liability for acts associated with "known and compelling dangers that give rise to ministerial duties on the part of public officers or employees." ***Id.***, ¶¶42, 53. The theory of this exception is that when a danger known to a public officer or employee is of such a compelling force, it strips that person of discretion or judgment and creates an absolute, certain, and imperative duty to act. ***Id.***, ¶34.

¶5 Citing several Wisconsin cases where the exception was applied, Yang asserts that the permissive climbing of retracted bleachers at the middle school constituted a known and compelling danger. The cited cases, however, are distinguishable on their facts. In ***Cords v. Anderson***, 80 Wis. 2d 525, 259 N.W.2d 672 (1977), our supreme court applied the exception when a park manager failed to warn the public of a ninety-foot gorge located inches from a hiking trail. While allowing the students to climb the retracted bleachers created a danger, it is not remotely analogous to the obvious and predictable danger posed by the cliff in ***Cords***.

¶6 In ***Voss v. Harrison***, 2006 WI App 234, ¶2, 315 Wis. 2d 350, 760 N.W.2d 156, students were learning about the effects of alcohol by wearing "fatal vision goggles" while performing various exercises such as walking in between rows of desks and standing on one leg. There were initial problems with students losing their balance and colliding into each other and, ultimately, a student was

injured when she fell and hit her mouth on a desk. ***Id.***, ¶¶3, 4. This court applied the exception, reasoning that despite the obvious hazards and knowledge of previous students falling, the teacher continued the exercise and took no precautions to minimize or prevent injury. ***Id.***, ¶19. Similarly, in ***Heuser v. Jacobs***, 2009 WI App 151, 321 Wis. 2d 729, 774 N.W.2d 653, an eighth-grade student in a lab class was injured while using a scalpel after two students in an earlier class suffered scalpel-related injuries. This court applied the exception, faulting the teacher for "doing nothing in the face of personal knowledge that using the scalpels raised a safety issue." ***Id.***, ¶17.

¶7 Here, there were no previous injuries from climbing the bleachers. Therefore, Yang fails to persuasively explain how ***Voss*** and ***Heuser*** are analogous to the present case. Unlike the teachers in ***Voss*** and ***Heuser***, Yang's teacher was not faced with a compelling danger of such force that the time, mode, and occasion for performance are evident with such certainty that nothing remains for the exercise of discretion. *See* ***Lister v. Board of Regents***, 72 Wis. 2d 282, 301, 240 N.W.2d 610 (1976).

¶8 Emphasizing that prior injury is not required for the compelling danger exception to apply, Yang argues that permissive climbing of the retracted bleachers was an accident waiting to happen. The known danger exception, however, "has been reserved for situations that are more than unsafe." ***Umansky v. ABC Ins. Co.***, 2009 WI 82, ¶14 n.7, 319 Wis. 2d 622, 769 N.W.2d 1. We do not agree that the alleged hazard in this case was so clear and absolute, and so certain to cause injury, as to constitute a known and compelling danger. The

circuit court, therefore, properly granted summary judgment in favor of the district.[2]

By the Court.—Judgment affirmed.

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

[2] To the extent Yang intimates that current signage telling students to stay off the bleachers when retracted somehow overrides the district's immunity, subsequent remedial measures are not admissible to prove negligence. *See* WIS. STAT. § 904.07. Moreover, the signs prove nothing more than the possibility that the district is exercising its discretion with respect to bleacher usage.