COURT OF APPEALS
DECISION
DATED AND FILED

February 5, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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. 96-2893, 96-2895, 96-2916, 96-2917, 96-2937, 96-2938 and 96-2939

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

Case No. 96-2893

ERIKA ENEMAN AND AMY NADLER,

PLAINTIFFS-APPELLANTS,

V.

PAT RICHTER, SUSAN RISELING, DAVID WILLIAMS,

DEFENDANTS-RESPONDENTS,

PER MAR SECURITY & RESEARCH, OXFORD HEALTH PLANS (CONNECTICUT), INC.,

DEFENDANTS.

Case No. 96-2895

TARA L. HARRISON, GARY HARRISON AND LOUISE HARRISON,

PLAINTIFFS-APPELLANTS,

V.

PAT RICHTER, MIKE GREEN AND SUSAN RISELING,

DEFENDANTS-RESPONDENTS,

PER MAR SECURITY & RESEARCH, CIGNA HEALTH CARE,

DEFENDANTS,

DAVID WILLIAMS,

DEFENDANT-RESPONDENT,

STRUCK & IRWIN FENCE, INC., XYZ INSURANCE CORP.,

DEFENDANTS.

Case No. 96-2916

ALYSON J. BEROWITZ, AND STEPHEN S. BEROWITZ,

PLAINTIFFS-APPELLANTS,

v.

PAT RICHTER, MIKE GREEN, SUSAN RISELING,

DEFENDANTS-RESPONDENTS,

PER MAR SECURITY & RESEARCH,

DEFENDANT,

DAVID WILLIAMS,

DEFENDANT-RESPONDENT,

STRUCK & IRWIN FENCE, INC., XYZ INSURANCE CORPORATION,

DEFENDANTS.

Case No. 96-2917

REBECCA S. LEVINE, DAVID P. LEVINE, THE GUARDIAN LIFE INSURANCE COMPANY OF AMERICA,

PLAINTIFFS-APPELLANTS,

V.

PAT RICHTER, MIKE GREEN, SUSAN RISELING,

DEFENDANTS-RESPONDENTS,

PER MAR SECURITY & RESEARCH,

DEFENDANT,

DAVID WILLIAMS,

DEFENDANT-RESPONDENT,

STRUCK & IRWIN FENCE, INC., XYZ INSURANCE CORPORATION,

DEFENDANTS.

Case No. 96-2937

SUSAN K. ROEMER,

PLAINTIFF-APPELLANT,

BLUE CROSS & BLUE SHIELD UNITED OF WI,

INVOLUNTARY-PLAINTIFF,

V.

SUSAN RISELING,

DEFENDANT-RESPONDENT,

DAVID WILLIAMS,

DEFENDANT,

PATRICK RICHTER,

DEFENDANT-RESPONDENT,

MICHAEL GREEN,

DEFENDANT,

DAVID WARD,

DEFENDANT-RESPONDENT,

UW-MADISON, PER MAR SECURITY & RESEARCH, STRUCK & IRWIN FENCE, INC.,

DEFENDANTS.

Case No. 96-2938

STEPHANIE M. KAPLAN,

PLAINTIFF-APPELLANT,

JOHN ALDEN LIFE INSURANCE COMPANY, A FOREIGN INSURANCE CORPORATION,

INVOLUNTARY-PLAINTIFF,

V.

SUSAN RISELING,

DEFENDANT-RESPONDENT,

DAVID WILLIAMS,

DEFENDANT,

PATRICK RICHTER,

DEFENDANT-RESPONDENT,

MICHAEL GREEN,

DEFENDANT,

DAVID WARD,

DEFENDANT-RESPONDENT,

UW-MADISON, PER MAR SECURITY & RESEARCH, STRUCK & IRWIN FENCE, INC.,

DEFENDANTS.

Case No. 96-2939

ADAM P. READ,

PLAINTIFF-APPELLANT,

V.

SUSAN RISELING,

DEFENDANT-RESPONDENT,

DAVID WILLIAMS,

DEFENDANT,

PATRICK RICHTER,

DEFENDANT-RESPONDENT,

MICHAEL GREEN,

DEFENDANT,

DAVID WARD,

DEFENDANT-RESPONDENT,

UNIVERSITY OF WISCONSIN - MADISON, PER MAR SECURITY & RESEARCH, STRUCK & IRWIN FENCE, INC.,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Dane County: WILLIAM D. JOHNSTON, Judge. *Affirmed.*

Before Eich, C.J., Vergeront and Roggensack, JJ.

ROGGENSACK, J. The appellants alleged they suffered personal injuries after a University of Wisconsin football game at Camp Randall Stadium, which injuries they claim resulted from the negligence of David Ward, Patrick Richter, Susan Riseling, Michael Green and David Williams, while the respondents[1] were employed by the State on behalf of the University of Wisconsin. Respondents moved for summary judgment, based on the common law doctrine of public officer immunity. The circuit court concluded there were no material factual disputes and dismissed the appellants' claims. Because we

[1] Not all of the appellants appealed the summary judgments dismissing each respondent in each case, but because the appeals have been consolidated and because these respondents' dismissals were appealed by at least some of the appellants, we treat them collectively, unless indicated to the contrary in the body of the opinion.

agree that the material facts are not in dispute and that the respondents are entitled to immunity, we affirm.

BACKGROUND

This is a consolidated appeal of summary judgments dismissing the claims of the appellants, all of whom are alleged to have suffered personal injuries when they were crushed by persons attempting to come onto the playing field at Camp Randall Stadium after the 1993 Wisconsin/Michigan football game. They assert their injuries would not have occurred if certain gates had not been closed by security personnel at the conclusion of the game and that the closing of the gates constituted negligence. David Ward, Chancellor for the University of Wisconsin-Madison; Patrick Richter, Athletic Director for the University of Wisconsin-Madison; Susan Riseling, Chief of Police and Security for the University of Wisconsin-Madison; Michael Green, Camp Randall Facilities and Events Coordinator; and David Williams, a University police officer in Riseling's department, were state governmental employees on the date of the appellants' alleged injuries. They filed an answer denying negligence, and based on their status as state governmental employees, they asserted the affirmative defense of discretionary immunity, on which they moved for summary judgment.[2]

Camp Randall Stadium is the site used for football games and other outdoor events at the University of Wisconsin-Madison. The football field is encircled by a chain link fence with a walkway between the fence and the bottom row of bleachers. Ingress and egress of the bleachers varies, depending on the

[2] The University of Wisconsin-Madison was also a named defendant in appellants' lawsuits. It was dismissed based on sovereign immunity; however, the appellants do not challenge that decision on appeal.

section of the stadium. Sections O and P are at issue in this lawsuit. The lower rows of sections O and P exit to the walkway and then through the home team tunnel.[3] It was also possible for those rows to exit to the field itself, even though security personnel directed spectators not to do so.

Prior to the 1993 football season, access to the field was limited by hand held ropes, which provided no real barrier to a spectator determined to enter the field. In anticipation of the 1993 football season, the University installed metal gates that could be positioned to close off the walkway at the bottom of the bleachers in order to permit the team to exit the field into the tunnel without interference from the spectators. When the walkway was closed off by the gates, sections O and P spectators' means of egress was restricted, until the team had made its way through the tunnel and the gates were opened again.

On October 30, 1993, after the University of Wisconsin's football team defeated the University of Michigan's team at Camp Randall, many of the students in sections O and P attempted to come onto the playing field. However, a few minutes before the game's end, the gates had been closed and latched by security personal. This provided a significant barrier to the spectators' egress onto the field, and it also created a dead end for tunnel egress from sections O and P, at a time when spectators were moving down the bleachers to exit the stadium or to push onto the field. The appellants were crushed against a metal railing and the gates when security personnel were unable to quickly unlatch the gates to open them.

[3] It is called the "home team tunnel" because Wisconsin's football team enters and departs from the field through it.

Ward and Richter had no personal responsibility to manage the crowd at the Camp Randall games. On the other hand, Riseling's, Green's and Williams's activities at Camp Randall were arguably within the scope of the Standard Operating Procedures for Camp Randall relating to crowd control. Additionally, prior to the Michigan game, and subsequent to the installation of the gates, Riseling knew that it was possible that the students might try to rush onto the field at the game's end. In response to this potential for congestion in the student sections, she formulated and issued a directive entitled, "POST GAME CROWD TACTICS," whose goal was "to prevent injury to people — officers, band members and fans." The plan outlined a general strategy to follow which, in her judgment, would have prevented injury. Although her plan was implemented by security personnel, it was not successful.

DISCUSSION

Standard of Review.

It is well established that this court applies the same summary judgment methodology as the circuit court. ***Smith v. Dodgeville Mut. Ins. Co.***, 212 Wis.2d 226, 232, 568 N.W.2d 31, 34 (Ct. App. 1997). We first examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it presents a material issue of fact or law. ***Id.*** If we conclude that the complaint and the answer are sufficient to join issue, we examine the moving party's affidavits to determine whether they establish a *prima facie* case for summary judgment. ***Id.*** If they do, we look to the opposing party's affidavits to determine whether there are any material facts in dispute which entitle the opposing party to a trial. ***Id.*** at 233, 568 N.W.2d at 34.

Whether immunity lies because of the common law doctrine of public officer immunity is a question of law which we review *de novo*. ***Kimps v. Hill***, 200 Wis.2d 1, 8, 546 N.W.2d 151, 155 (1996) (citing ***K.L. v. Hinickle***, 144 Wis.2d 102, 109, 423 N.W.2d 528, 531 (1988)). A question of law is also presented when we decide whether the safe place statute applies to this case. ***Ruppa v. American States Ins. Co.***, 91 Wis.2d 628, 639, 284 N.W.2d 318, 322 (1979).

Public Officer Immunity.

1. General Background.

Generally, public officer immunity precludes personal liability for discretionary acts performed within the scope of a state officer's official duties. ***Lister v. Board of Regents***, 72 Wis.2d 282, 300, 240 N.W.2d 610, 621 (1976). Public officer immunity has developed as a separate and distinct doctrine from that of sovereign immunity. Public officer immunity is grounded in public policy considerations, rather than being grounded in the constitution, as is the state's sovereign immunity. ***Kimps***, 200 Wis.2d at 9, 546 N.W.2d at 155. The public policy considerations which underlie public officer immunity were first set out in ***Lister***. These considerations include:

> (1) The danger of influencing public officers in the performance of their functions by the threat of lawsuit; (2) the deterrent effect which the threat of personal liability might have on those who are considering entering public service; (3) the drain on valuable time caused by such actions; (4) the unfairness of subjecting officials to personal liability for the acts of their subordinates; and (5) the feeling that the ballot and removal procedures are more appropriate methods of dealing with misconduct in public office.

Lister, 72 Wis.2d at 299, 240 N.W.2d at 621.

Even though under the common law in Wisconsin, state officers and their employees are generally immune from personal liability for negligent acts performed within the scope of their employments, ***id.*** at 300, 240 N.W.2d at 621, there are exceptions to that immunity. The exceptions represent a judicial balance of "the need of public officers to perform their functions freely against the right of an aggrieved party to seek redress." ***C.L. v. Olson***, 143 Wis.2d 701, 710, 422 N.W.2d 614, 617 (1988) (citing ***Lister***, 72 Wis.2d at 300, 240 N.W.2d at 621). The general categories of exceptions are: (1) the negligent performance of a purely ministerial duty, ***id.*** at 300-01, 240 N.W.2d at 621-22; (2) harm resulting from a malicious or willful act, ***Ibrahim v. Samore***, 118 Wis.2d 720, 728, 348 N.W.2d 554, 558 (1984); and (3) the negligent performance of discretionary acts that are non-governmental in nature, ***Stann v. Waukesha County***, 161 Wis.2d 808, 817-18, 468 N.W.2d 775, 779 (Ct. App. 1991). Only the first and third exceptions are at issue in this appeal.

2. Appellants' Claims.

a. Ministerial vs. Discretionary Acts.

We begin by noting that no liability accrues from simple mistakes in judgment, if a part of the state officer's employment is exercising such judgments. ***Lister***, 72 Wis.2d at 301-02, 240 N.W.2d at 622. However, "an officer is liable for damages resulting from his negligent performance of a purely ministerial duty." ***Id.*** at 300-01, 240 N.W.2d at 621-22. A public officer's duty is ministerial only in the limited circumstance when the duty 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. at 301, 240 N.W.2d at 622. Additionally, a public officer has a ministerial duty to act when the officer knows of an obvious danger. ***Cords v. Anderson***, 80 Wis.2d 525, 542, 259 N.W.2d 672, 680 (1977). As explained in subsequent decisions, the duty to act arises when "the nature of the danger is compelling and known to the officer and is of such force that the public officer has no discretion not to act." ***Olson***, 143 Wis.2d at 715, 422 N.W.2d at 619. However, once a state officer does take action within the scope of his official duties in response to a compelling and known danger, his decision about what action is appropriate under the circumstances is discretionary. ***Kimps***, 200 Wis.2d at 15-16, 546 N.W.2d at 158.

Among the allegations contained within the seven complaints underlying this appeal, appellants contend that the respondents had ministerial duties because: (1) an open and obvious danger existed from spectators trying to exit the field when the gates across the walkway were closed and other spectators were trying to rush the field, and (2) the Standard Operating Procedures for Camp Randall, when combined with their job descriptions, required them to take the specific actions necessary to prevent injuries to those attending the game. In respondents' answers, they deny they had ministerial duties they failed to perform and they assert they are immune from liability for their discretionary acts. Therefore, issue was joined.

In the affidavits submitted in support of summary judgment, Ward and Richter maintain their jobs did not include personal responsibility for taking any specific action in regard to crowd control at football games. Riseling, while

agreeing her official duties included working generally in areas of crowd control and safety at Camp Randall, denied she had the responsibility to perform any specific tasks in that regard. She acknowledged that a potential existed for spectators to come onto the field at the conclusion of the game, but she denied she knew they would do so in a manner that would injure others or themselves.[4] In opposition to the summary judgment motion, appellants submitted portions of the depositions of all the respondents and of nine other witnesses, together with various documents discussed in those depositions.

Based on the information before us, we assume, without deciding, that there was a compelling and known danger of injury of sufficient magnitude to create a ministerial duty to act for Riseling, as Chief of Police and Security, due to her knowledge of the possibility of a crowd surge onto the field. However, Riseling did not ignore the potential danger. She, with the assistance of others, formulated a plan, the "POST GAME CROWD TACTICS," the goal of which was "to prevent injury to people — officers, band members and fans."

The plan established no specific tasks that were to be performed at a time certain; rather, it made general statements and set general guidelines such as,

> We expect that if Wisconsin wins today, especially if it is a close game, there will be an attempt by fans to come onto the field.
>
> …
>
> If there is a crowd surge, officers at that point will make the initial decision to move aside and begin pulling back to the

[4] Although student spectators had rushed the field at the conclusion of the game previous to October 30th, any injuries sustained by them usually occurred as a result of falling off of, or being hit by, the goal posts.

> goalpost assignment. Lt. Johnson will be observing from the press box and will make decisions on giving the command for all officers to pull back.
>
> …
>
> There may be times during and after the game when people crowd the fence and put pressure against it. Actively encourage them to move back. If it seems there is danger of the fence breaking (it has in the past) move back to a safe position.

The appellants rely on ***Cords***, but this is not a ***Cords*** type of case where immunity was denied the manager of Parfrey's Glen park. There he knew that a certain trail that passed within inches of a cliff at the edge of a ninety foot gorge was used regularly by visitors. He knew the trail was especially hazardous at night, yet he did nothing about the obvious danger. Based on those facts, the supreme court held he had a ministerial duty to act. ***Cords***, 80 Wis.2d at 541-42, 259 N.W.2d at 680. By contrast, this case is similar to ***Kimps***, where the potential for injury existed in the teaching of a physical education class and the supervising teacher focused his attention on the activity he decided had the greatest potential to prevent injury. *See* ***Kimps***, 200 Wis.2d at 12, 546 N.W.2d at 156. It also has parallels to ***Barillari v. City of Milwaukee***, 194 Wis.2d 247, 260, 533 N.W.2d 759, 764 (1995), where the very nature of law enforcement was held to require "moment-to-moment decision making and crisis management" while involved in the exercise of discretion.

Here, the formation of the post-game crowd control plan represented Riseling's judgment about how best to reduce the potential for injury to persons at the game. "A discretionary act is one that involves choice or judgment." ***Kimps,*** 200 Wis.2d at 23, 546 N.W.2d at 161 (citation omitted). Additionally, the implementation of the plan required Riseling, Green and Williams to respond to

their assessment of what the crowd's actions required. By its very nature, the way the plan was effected had to change from moment to moment because the plan was responsive to the crowd. Reacting to the crowd also constituted the exercise of discretion. Furthermore, neither the documents nor the testimony contained in any of the portions of the depositions submitted in opposition to respondents' motion for summary judgment established a factual dispute about whether any specific acts were required of any of the respondents. Therefore, we conclude that the decision about what type of a plan to formulate to safely manage the crowd, as well as the implementation of the chosen plan, were discretionary, not ministerial, acts.

b. Non-governmental acts.

Appellants also argue that respondents' acts in relation to the prevention of injury at the October 30th game, even if discretionary, were non-governmental in nature. They rely on various cases involving the denial of immunity to municipalities, such as ***Holytz v. City of Milwaukee***, 17 Wis.2d 26, 115 N.W.2d 618 (1962), and ***Turner v. City of Milwaukee***, 193 Wis.2d 412, 535 N.W.2d 15 (Ct. App. 1995), and also on cases where recreational immunity was denied, such as ***Linville v. City of Janesville***, 174 Wis.2d 571, 497 N.W.2d 465 (Ct. App. 1993).

Holytz abrogated the doctrine of municipal immunity for torts. Thereafter, the general rule became municipal liability and the exception became municipal immunity. ***Holytz***, 17 Wis.2d at 39, 115 N.W.2d at 624. ***Kimps*** recognized the holding in ***Holytz***, but refused to apply it to limit the doctrine of state officer immunity. It concluded that whether an action was governmental or non-governmental was not the proper test to determine immunity for a state

officer. "When reviewing the common law rule of immunity for state officers or employees, the inquiry has been and remains primarily one of determining whether the alleged negligent conduct involved a discretionary or ministerial duty." ***Kimps***, 200 Wis.2d at 20 n.12, 546 N.W.2d at 160 n.12. As in ***Holytz***, ***Turner*** is a suit against a municipality, where the rule is liability, not immunity. It is also subject to the supreme court's conclusion in ***Kimps,*** cited above.

Linville turned on whether the actions taken by paramedics employed by the City of Janesville were shielded by the doctrine of recreational immunity because they were taken at a lake where the injured parties initially intended to be engaged in recreational activities. The statutes that established recreational immunity are driven by the goal of opening up recreational areas for use by the general public. The rescue workers in ***Linville*** were held not to have recreational immunity because their activities were not those of one who opens up lands to public recreational use. ***Linville,*** 174 Wis.2d at 582 n.4, 497 N.W.2d at 470 n.4. The policies behind ***Linville*** have no applicability here where completely different policies bottom the common law doctrine of state officer immunity.

Furthermore, the non-governmental exception to immunity was developed in cases where the claimed negligence occurred in a medical malpractice context. In creating this exception, the supreme court reasoned that because the exercise of a physician's judgment is based on highly technical, professional skills, not on governmental actions such as administering a plan or implementing a policy, there was no need to cloak a physician's acts with immunity. ***Scarpaci v. Milwaukee County***, 96 Wis.2d 663, 292 N.W.2d 816 (1980). We have followed that directive in medical malpractice cases. *See* ***Gordon v. Milwaukee County***, 125 Wis.2d 62, 67-68, 370 N.W.2d 803, 806-07

(Ct. App. 1985). However, it has not been applied in any other context. *See* ***Stann***, 161 Wis.2d at 818, 468 N.W.2d at 779-80.

Here, documents provided in support of, and in opposition to, the respondents' motion for summary judgment establish no inconsistency between the actions of those respondents whose job duties took them personally into crowd control management activities, and the University's policy of safe management of the crowd at football games. Rather, they acted in accord with the General Operating Procedures for Camp Randall Stadium. Neither the formulation of the plan nor the implementation of it required highly technical, professional skills, such as a physician's. Therefore, we conclude that the respondents' activities were governmental in nature and we decline to extend the exception to immunity found in ***Gordon*** in this context.

Safe Place.

The appellants also allege they have safe place claims against the respondents, which claims are not subject to the doctrine of public officer immunity. In support of their contention, they allege that § 101.11, STATS., requires the respondents to provide a safe place for the spectators of the football games at Camp Randall Stadium and that by the alleged violation of certain sections of the building codes, they have violated a duty to the appellants. The respondents counter that they were neither owners nor employers nor independent contractors who had the requisite control and custody of Camp Randall Stadium necessary to the imposition of potential liability under either theory. We agree with the conclusion of the respondents.

The provisions of the safe place statute are found in § 101.01, STATS., *et seq.* They apply both to places of employment and to public buildings.

Ruppa, 91 Wis.2d at 639, 284 N.W.2d at 322. In order to be a place of employment, the facility must be used for profit-making purposes. "Institutions operated by nonprofit or governmental organizations are not places of employment," within the meaning of § 101.01(11). ***Id.*** (citing ***Rogers v. Oconomowoc***, 24 Wis.2d 308, 128 N.W.2d 640 (1964)) (further citations omitted). Additionally, nothing which has been submitted in this case could cause us to conclude that the respondents are employers within the meaning of the safe place statute.

Under § 101.01(12), STATS., Camp Randall is a public building. However, the appellants did not allege in their complaints, nor did they submit any evidentiary material which could lead this court to conclude that any respondent was an owner or an independent contractor, who had complete control and custody of Camp Randall Stadium. Rather, appellants have consistently asserted that all of the respondents were employees of the State. The supreme court has conclusively established that agents or employees who operate as supervisory personnel for the principal owner of a building are not subject to liability under § 101.11, STATS. ***Ruppa,*** 91 Wis.2d at 643, 284 N.W.2d at 323. Further, the supreme court has held that the safe place duty imposed by the statutes on an owner or employer is a duty that is non-delegable. ***Dykstra v. Arthur G. McKee & Co.***, 100 Wis.2d 120, 130, 301 N.W.2d 201, 206 (1981). And finally, we are not persuaded that any of the respondents had a ministerial duty to comply with the building code, as appellants assert. They cite us no authority for this theory, and in our view, it would be inconsistent to hold there were such a duty when a violation of a building code is a violation of the safe place statute and we have already concluded that the safe place statute is not applicable to the respondents. *See* ***Wannmacher v. Baldauf Corp.***, 262 Wis. 523, 539c, 57 N.W.2d 745, 746 (1953).

Miscellaneous Theories of Liability.

Appellants also argue that we should apply ***Minick v. City of Menasha***, 200 Wis.2d 737, 547 N.W.2d 778 (Ct. App. 1996) in a way which will result in the abrogation of immunity for the respondents. ***Minick*** involved a city sewer system that flooded Minick's home several times, whereafter she claimed it was a nuisance. We concluded that, under controlling precedent, the City did not have immunity from tort liability, but that the action must be dismissed because Minick had not provided facts sufficient to oppose the summary judgment motion. We note here that Minick brought her suit against a municipality, where the rule for torts is liability, not immunity. ***Kimps***, 200 Wis.2d at 20 n.12, 546 N.W.2d at 160 n.12. The lawsuit at issue here is against state officers, where the rule is immunity, not liability. ***Lister***, 72 Wis.2d at 300, 240 N.W.2d at 621. Therefore, we conclude ***Minick*** has no applicability to this case.

CONCLUSION

Because the appellants have submitted no evidentiary facts from which we could conclude that the respondents had ministerial duties which they failed to perform and because neither the safe place statute nor any other theory of liability put forth by the appellants applies to the respondents, we affirm the summary judgment dismissing appellants' claims against the respondents.

By the Court.—Judgment affirmed.

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