COURT OF APPEALS DECISION DATED AND FILED

August 18, 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. 98-0415

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

ANN LEE BOGAN AND ALFRED GODFREY SCHNELL, SPECIAL ADMINISTRATOR OF THE ESTATE OF ALEXANDER SCHNELL, DECEASED,

PLAINTIFFS-APPELLANTS,

V.

PRICE COUNTY, WAYNE WIRSING AND WISCONSIN COUNTY MUTUAL INSURANCE CORPORATION,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Price County: DOUGLAS T. FOX, Judge. *Affirmed.*

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

HOOVER, J. Ann Lee Bogan and Alfred Godfrey Schnell appeal a judgment dismissing their wrongful death claim against Price County. On appeal, Bogan and Schnell claim the trial court erred by concluding that public official's

and employee's discretionary acts are not subject to tort liability. We conclude that public officials and employees are immune from liability arising out of the performance of discretionary acts and therefore affirm the judgment.

Fifteen year old Alexander Schnell committed suicide while being held in the Price County jail on a pending homicide charge. On December 7, 1993, Schnell shot and killed his grandmother. Shortly thereafter he telephoned the Price County Sheriff's Department and was arrested without incident. After Schnell was taken into custody, he gave a verbal and written confession to police in which he admitted to going into his grandmother's bedroom while she was sleeping and intentionally shooting her in the head with a deer rifle.

Schnell was waived into adult court and charged with first-degree intentional homicide. He was booked into the Price County jail pending further proceedings in the case. In accordance with jail policy and procedure, the jailer, deputy Daniel Greenwood, completed a medical intake report. Greenwood noted that Schnell appeared "depressed" and "upset" but did not appear to be suicidal nor did Schnell make any suicidal threats. Although Greenwood did not believe Schnell's behavior indicated a threat of suicide, as a precaution he advised the jail staff to treat Schnell as a suicide risk and to personally check on him every five minutes in addition to monitoring him on the jail's closed circuit television cameras. One week later, the monitoring of Schnell was relaxed, but the staff was still directed to keep a close watch on him, which they did.

During his incarceration, Schnell retained normal privileges. He regularly received and sent mail. Schnell had access to the library, a television

and a ping-pong table. He was also permitted regular visits from his grandfather, Alfred Schnell,[1] and a lay minister, who regularly visited the inmates at the jail.

On March 8, 1994, Schnell threatened to kill one of his cellmates by pushing a pencil up the cellmate's nose and into his brain while he was sleeping. As a result, Schnell was placed in a solitary cell. His privileges were not curtailed. Schnell continued to send and receive mail, to have access to the telephone and library, and to receive visitors.

On March 11, 1994, Schnell disassembled a pencil, removing the metal eraser holder. The jail staff could not find the missing piece. Schnell alleged that he flushed it down the toilet. The jailer noted two small superficial cuts on Schnell's arm. The cuts did not require medical attention but were noted in the jail notebook.

On March 13, 1994, Schnell suffered from a nose bleed. The jailer verified that the blood was in fact the result of a nose bleed and not a self-inflicted incision. Schnell declined medical attention. Two days later, he again suffered a nose bleed. The jailer turned on the shower in Schnell's cell to provide extra moisture.

As a result of Schnell's threats to his cellmates and a concern for Schnell's state of mind, the jailers referred him for a psychological evaluation to Daniel Horgan, director of Counseling & Personal Development Center, Inc. Horgan met with Schnell on March 14, 1994, to evaluate him for depression and to determine his potential to harm both himself and others. The jailers specifically

[1] Schnell has resided with his grandparents since he was two years old. Schnell's mother, Ann Lee Bogan, lives in Illinois and has had only sporadic contact with Schnell.

advised Horgan of the superficial cuts on Schnell's arm and of Schnell's threats to his cellmate. However, the jailers did not advise Horgan that Schnell had disassembled a pencil or that Schnell had been deemed a suicidal risk when he was booked in February.

During the session with Horgan, Schnell offered no explanation for the cuts on his wrist and denied he was suicidal. Horgan noted that "observation of the wounds, their locations and lack of severity would confirm this claim." Horgan concluded that although Schnell appeared to be depressed, he did not appear to be suicidal. Based on Schnell's history, Horgan advised the jail staff that Schnell did present a risk of harm to others, should continue to be watched and should be kept away from other inmates.

On March 21, 1994, Horgan met with Schnell for a second time. Horgan once again concluded that Schnell appeared depressed but not suicidal. Schnell again denied any suicidal intent. Horgan advised that there was no basis to seek emergency detention under ch. 51, STATS.

On March 23, 1994, Horgan conferred with his supervising psychologist, Michael Galli. Horgan provided Galli with Schnell's history, including an account of Horgan's sessions and information the jailers provided to Horgan. Following this conference, Horgan warned the jail staff of Schnell's "high potential for violence." As a result of Horgan's warning, the sheriff advised the jail personnel to be extra careful around Schnell and not to put themselves or any of Schnell's visitors in a situation in which Schnell could harm them. The sheriff's warning was noted in a special notebook of information for the jailers.

Horgan continued to meet with Schnell on a regular basis in order to provide supportive therapy and to give Schnell an opportunity to "ventilate" his

frustrations and feelings. On April 4, 1994, Horgan noted that Schnell was beginning to "open up" and appeared to be valuing his visits and adjusting to incarceration.

On April 9, 1994, during the early morning hours, Schnell committed suicide by hanging himself with a sheet in the shower area of his cell. Schnell's cell was being monitored by jail staff every fifteen minutes and was closely monitored by the closed circuit television. The shower area was out of view of the television camera.

Thereafter Schnell's grandfather, Alfred Schnell, and mother, Ann Bogan, initiated this suit against Price County, sheriff Wayne Wirsing and Wisconsin County Mutual Insurance Corporation for Schnell's wrongful death. The plaintiffs allege that the sheriff and his agents negligently breached their discretionary duties owed to Schnell under § 302.38(1), STATS.[2]

The County brought a motion for dismissal or, in the alternative, a motion for summary judgment, alleging immunity under § 893.80(4), STATS.[3]

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[2] Section 302.38(1), STATS., provides:

> If a prisoner needs medical or other hospital care or is intoxicated or incapacitated by alcohol the sheriff, superintendent or other keeper of the jail or house of correction shall provide appropriate care or treatment and may transfer the prisoner to a hospital or to an approved treatment facility under s. 51.45(2)(b) and (c), making provision for the security of the prisoner.

[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

(continued)

The court chose not to address the motion to dismiss, but found, as a matter of law, that the County fulfilled its duty to provide appropriate care and treatment to Schnell and, therefore, was entitled to immunity.

The court granted the defendant's motion for summary judgment. The plaintiffs contend that the trial court erred by granting summary judgment. Specifically, they argue the trial court should not have found the County immune from liability in which disputed issues of material facts exist whether the sheriff's agents negligently breached their discretionary duties owed to Schnell under § 302.38(1), STATS.

Our review of the trial court's decision to grant summary judgment presents a question of law that we review de novo. ***Ottinger v. Pinel***, 215 Wis.2d 265, 272, 572 N.W.2d 519, 521 (Ct. App. 1997). When reviewing summary judgment, we apply the standard set forth in § 802.08(2), STATS., in the same manner as the circuit court. ***Kreinz v. NDII Secs. Corp.***, 138 Wis.2d 204, 209, 406 N.W.2d 164, 166 (Ct. App. 1987). If a dispute of any material fact exists, or if the material presented on the motion is subject to conflicting factual interpretations or inferences, summary judgment must be denied. *See* ***State Bank v. Elsen***, 128 Wis.2d 508, 512, 383 N.W.2d 916, 918 (Ct. App. 1991). The burden is on the moving party to establish the absence of a genuine issue of material fact, *see* ***Bantz v. Montgomery Estates, Inc.***, 163 Wis.2d 973, 984, 473 N.W.2d 506, 510 (Ct. App. 1991), and we draw all reasonable inferences in favor of the nonmoving party, *see* ***Grams v. Boss***, 97 Wis.2d 332, 339, 294 N.W.2d 473, 477 (1980).

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employes for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

We conclude that the County is entitled to immunity as a matter of law. Public officers and employees are immune from personal liability for the negligent performance of discretionary acts committed during the scope of their employment. ***Ottinger,*** 215 Wis.2d at 272, 572 N.W.2d at 521.[4] There are three exceptions to the shield of immunity: First, if the public employee engages in malicious, willful or intentional conduct; second, if the public employee negligently performs a ministerial duty; and, third, if the public 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. ***Barillari v. City of Milwaukee***, 194 Wis.2d 247, 257-58, 533 N.W.2d 759, 763 (1995).

The plaintiffs do not argue that any of these exceptions exist. In fact, the plaintiffs concede that the sheriff's agents engaged in discretionary duties in their care of Schnell. The plaintiffs seem to suggest, however, that ***Swatek v. County of Dane***, 192 Wis.2d 47, 531 N.W.2d 45 (1995), a case involving § 302.38(1), STATS., effectively creates a new exception to the rule of immunity for public officials.[5] Therefore, we address ***Swatek*** in order to determine whether a public employee can be sued for the negligent performance of a discretionary act under § 302.38(1).

In ***Swatek***, an inmate sued the county alleging that it breached its duty under § 302.38(1), STATS., to provide appropriate medical care and treatment

[4] In ***Ottinger v. Pinel***, 215 Wis.2d 265, 572 N.W.2d 519 (Ct. App. 1997), a minor was injured when he was struck by a truck driven by an escaped inmate. ***Id***. at 270, 572 N.W.2d at 520. The minor's mother brought an action against the guards alleging negligence in allowing the inmate to escape. ***Id***. at 271, 572 N.W.2d at 521. The court held that the guards were immune from liability since the duty to prevent escape is discretionary. ***Id***. at 275, 572 N.W.2d at 522.

[5] ***Swatek v. County of Dane***, 192 Wis.2d 47, 531 N.W.2d 45 (1995), did not address whether Dane County was immune from liability under § 893.80(4), STATS.

during an attack of appendicitis. The court concluded that § 302.38(1) mandates that prisoners be provided appropriate medical care and treatment; however, sheriffs and other jail keepers have discretion how to provide that care or treatment. ***Id***. at 52, 531 N.W.2d at 47. ***Swatek*** implies that the general duty to provide appropriate care and treatment to an inmate is ministerial, although the manner in which the public employee meets this duty is purely discretionary.

Although ***Swatek*** does not expressly address the issue of immunity, the plaintiffs argue that the case suggests a public employee may not have immunity for discretionary acts. The plaintiffs focus on ***Swatek***'s language stating that "discretion may be exercised in a variety of ways, but is, of course, subject to review by the courts of this state, and the welfare of the inmates may not be disregarded." ***Id***. at 60, 531 N.W.2d at 50. The plaintiffs argue that this language establishes a right to judicial review of § 302.38(01), STATS., discretionary acts when "the discretionary act become[s] discolored so as to adopt the features of a mandatory act …."[6] Apparently, in the plaintiffs' view, the grant of judicial review of § 893.80(4), STATS., discretionary acts is meaningless if upon such review there is no remedy for negligent acts.

Contrary to the plaintiffs' argument, ***Swatek*** does not overrule, nor are we permitted to abrogate that line of case law finding public employees immune from negligence in their discretionary acts. First, a public employee's discretionary act is subject to meaningful review in a tort action. The court may initially determine whether the employee's act fits into one of the well-established

[6] The plaintiffs perhaps could use this same language to argue that the third exception to the immunity rule, awareness of special danger, applies in this case. Nonetheless, they do not advance this argument. It is a "well-established rule" in Wisconsin that appellate courts need not and ordinarily will not consider or decide issues that are not specifically raised on appeal. ***Waushara County v. Graf***, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19 (1992).

common law exceptions. If it does, then relief may be available to the plaintiff.[7] Second, we are confident that if the court had intended to overrule previous case law addressing discretionary immunity, it would have done so expressly. Because the plaintiffs do not allege that Price County agent's discretionary acts fit into one of these exceptions, we conclude that it is immune from suit for the discretionary acts of its agents.

In sum, we conclude that the trial court was correct in dismissing the plaintiffs' complaint because the County is immune from suit for the negligent performance of its agents' discretionary acts. Therefore, we will not delve into the trial court's analysis whether the sheriff's employees fulfilled their duty to provide appropriate medical care and treatment to Schnell under § 302.38(1), STATS.[8]

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

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[7] Nothing in ***Swatek*** suggests, nor do the plaintiffs attempt to argue, that the judicial authority to review the executive's discretionary execution of a ministerial act implies that only a tort remedy is available or appropriate.

[8] We do not need to go into the facts of the case when the plaintiffs do not allege that the agents breached any ministerial duties or that their actions fit into one of the exceptions to the immunity rule. *See* ***Graf***, 166 Wis.2d at 451, 480 N.W.2d at 19.