COURT OF APPEALS
DECISION
DATED AND FILED

July 7, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP809 **Cir. Ct. No. 2011CV4252**

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

LOGAN A. DARGENIO, A MINOR, BY HIS GUARDIAN AD LITEM, BRANDON D. DERRY, DAVID M. DARGENIO AND PHYSICIANS PLUS INSURANCE COMPANY,

PLAINTIFFS-RESPONDENTS,

V.

COMMUNITY INSURANCE CORPORATION AND MADISON METROPOLITAN SCHOOL DISTRICT,

DEFENDANTS-APPELLANTS.

APPEAL from an order of the circuit court for Dane County: PETER ANDERSON, Judge. *Reversed.*

Before Kloppenburg, P.J., Lundsten and Higginbotham, JJ.

¶1 PER CURIAM. Logan Dargenio was injured when a portable scorers table in a high school gymnasium fell on top of him. Dargenio sued the

Madison Metropolitan School District, alleging negligence and violation of Wisconsin's Safe Place Statute.[1] The School District moved for summary judgment, asserting that it is entitled to dismissal of Dargenio's claims based on governmental immunity under WIS. STAT. § 893.80(4) (2013-14).[2] The circuit court denied the School District's motion, concluding that the known and compelling danger exception to governmental immunity allows Dargenio's suit to proceed to trial. We granted the School District's petition for leave to appeal the circuit court's non-final order. *See* WIS. STAT. RULE 809.50(3).

¶2 The School District argues on appeal that it is immune from suit under WIS. STAT. § 893.80(4) and that neither the ministerial duty exception nor the known and compelling danger exception applies to abrogate its immunity in this case. Viewing the evidence presented on summary judgment in Dargenio's favor, we conclude that the School District is immune from liability, and, therefore, we reverse.

BACKGROUND

¶3 The following facts are taken from the summary judgment submissions, and are not disputed for purposes of this appeal.

¶4 Prior to, during, and since February 2010, La Follette High School has used a portable scorers table for the high school boys' and girls' basketball

[1] The plaintiffs are Logan, his father David Dargenio, and their insurer Physicians Plus Insurance Corp. We will refer to the plaintiffs collectively as Dargenio when we discuss the plaintiffs' claims and arguments. We will refer to Logan and David by their first names when we discuss the facts.

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

games in its gymnasium on Thursday and Friday nights. The scorers table is made of wood and consists of a vertical padded board on the front, a counter-like table extending backwards from the front board at the top, and, on the back side, a padded bench fitted below the counter-like table, on which the scorers sit when they are using the scorers table.

¶5 When the scorers table is in use, the bench is extended outwards away from the front board, so that the scorers can sit on it. The bench is kept in that position when it is stored, although the bench can be folded in towards the front board. There are also wooden trays, called press tables, which are stored inside the well between the front board and the bench underneath the counter-like table. The height of the front board of the scorers table measures 59.4 inches, and the scorers table weighs 459 pounds itself, and 524 pounds with the press tables stacked in the well.[3]

¶6 The scorers table is on casters, and it is rolled back and forth from its storage location along the wall in the corner of the gymnasium to its use location between the bleachers. Three members of the custodial staff move the scorers table from its storage location to its use location and remove the press tables just before each game, and place the press tables back inside the scorers table and

[3] Dargenio refers repeatedly in his appellate brief to the weight of the scorers table, citing an affidavit from his expert witness in opposition to his first summary judgment motion, which presents the table's height and weight. But Dargenio did not cite or resubmit that affidavit in his opposition to the second summary judgment motion, and the portions of the expert's deposition testimony that he did submit and cite in opposition to the second motion do not contain this information. Nevertheless, the circuit court appears to have considered this information in its decision on the second summary judgment motion, and, therefore, we note Dargenio's expert's calculation of the height and weight as part of these undisputed facts.

return the scorers table to its storage location by the wall in the corner immediately after each game.

¶7 On the evening of February 8, 2010, David brought Logan, who was then four and one-half years old, to watch while David participated in a recreational league basketball game at the La Follette High School gymnasium. During the game, David saw the scorers table a few feet away from its usual storage location by the wall in the corner. David had not seen the scorers table in that location before. As David and Logan were preparing to leave at the end of the game, the scorers table fell onto its front on top of Logan and injured him.

¶8 According to Dargenio's expert, it would take "a fairly low force" on the back (the bench side) to push over the scorers table onto its front (the padded board side), and the accident was caused by the scorers table not being restrained or chained to the wall and by that force being applied.

¶9 The custodial staff who had worked with the scorers table since 1991 testified that they were not aware of any incidents where the table had fallen over.[4]

¶10 The day after Dargenio's injury, on February 9, 2010, the school custodians installed chains and chained the scorers table to the wall in its storage location in the corner when the scorers table was not in use.

[4] Dargenio complains that none of the affiants "claim to have moved the scorer's table on or around February 8, 2010." The affiants include all of the custodial staff who worked with the scorers table, except for three former custodial employees who could not be reached. The affiants include the custodial staff who were working at the high school on February 8, 2010, including three employees who were present in the building at the time of the incident. That Dargenio never asked any of the affiants if they moved the scorers table "on or around February 8, 2010" does not create a dispute of material fact as to their not being aware that the table ever tipped or injured anyone.

¶11 Dargenio sued the School District alleging negligence and violation of Wisconsin's Safe Place Statute. The School District filed its first motion for summary judgment in June 2013, asserting that it is entitled to dismissal of Dargenio's claims based on governmental immunity under WIS. STAT. § 893.80(4), and that neither the ministerial duty exception nor the known and compelling danger exception applies to abrogate the School District's immunity. The circuit court denied the School District's motion, ruling that there was a genuine issue of material fact as to whether the scorers table was a known and compelling danger, and that Dargenio had not been able to undertake "all [his] discovery" to prove that the scorers table was a known and compelling danger. The court indicated that the ministerial duty exception likely does not apply.

¶12 Dargenio did not undertake additional discovery, and the School District filed a second motion for summary judgment in October 2014, asserting that it is entitled to governmental immunity and that the known and compelling danger exception does not apply. The circuit court denied the motion, concluding that the known and compelling danger exception to governmental immunity allows Dargenio's suit to proceed to trial. The court explained:

> [I]t did tip over. It's a big, big, heavy object; did not require very much force to tip over; it was normally stored with the seating part of it out which would offset, to some extent, the front tippyness; it was now in so it had the greatest tippyness; and it was located in a position where people with kids were likely to come.... That is all the evidence ....

¶13 We granted the School District's petition for leave to appeal the circuit court's non-final order. *See* WIS. STAT. RULE 809.50(3).

DISCUSSION

¶14 We review a circuit court's ruling on summary judgment de novo, employing the same methodology as the circuit court. ***Broome v. DOC***, 2010 WI App 176, ¶8, 330 Wis. 2d 792, 798, 794 N.W.2d 505. "To make a prima facie case for summary judgment, a moving defendant must show a defense that would defeat the plaintiff. If the moving party has made a prima facie case for summary judgment, the court must examine the affidavits and other proof of the opposing party to determine whether a genuine issue exists as to any material fact or whether reasonable conflicting inferences may be drawn from undisputed facts." ***Tews v. NHI, LLC***, 2010 WI 137, ¶4, 330 Wis. 2d 389, 793 N.W.2d 860.

¶15 "[W]e search the [r]ecord to see if the evidentiary material that the parties set out in support or in opposition to summary judgment supports reasonable inferences that require the grant or denial of summary judgment, giving every reasonable inference to the party opposing summary judgment." ***Chapman v. B.C. Ziegler and Co.***, 2013 WI App 127, ¶2, 351 Wis. 2d 123, 839 N.W.2d 425. "Whether an inference is reasonable and whether more than one reasonable inference may be drawn are questions of law." ***H&R Block E. Enters., Inc. v. Swenson***, 2008 WI App 3, ¶11, 307 Wis. 2d 390, 745 N.W.2d 421 (2007).

¶16 The School District's motion for summary judgment is based on its assertion of governmental immunity under WIS. STAT. § 893.80(4). If the School District is entitled to governmental immunity, then there is nothing to try even though factual disputes may exist regarding the issue of negligence. *See* ***Lodl v. Progressive N. Ins. Co.***, 2002 WI 71, ¶16, 253 Wis. 2d 323, 646 N.W.2d 314. Indeed, for purposes of immunity analysis, we assume the School District did act negligently, and we focus on whether the School District is entitled to

governmental immunity under WIS. STAT. § 893.80(4) and whether any exception applies to abrogate that immunity. ***Lodl***, 253 Wis. 2d 323, ¶17. "The application of the immunity statute and its exceptions involves the application of legal standards to a set of facts, which is a question of law." ***Id.***

¶17 Consistent with these well-established principles, we review the summary judgment materials submitted by the parties, drawing all reasonable inferences from the evidence in favor of Dargenio as the nonmoving party, and focus on whether the ministerial duty or known and compelling danger exceptions apply to abrogate the School District's immunity. We first briefly review the law relating to governmental immunity. We then review the law relating to each of the exceptions to governmental immunity and apply that law to the undisputed facts. We conclude that neither exception applies to abrogate the School District's immunity, and we address and reject Dargenio's arguments to the contrary.

A. Governmental Immunity Under WIS. STAT. § 893.80(4)

¶18 WISCONSIN STAT. § 893.80(4) immunizes units of local government and their officers and employees from liability "for legislative, quasi-legislative, judicial, and quasi-judicial acts, which have been collectively interpreted to include any act that involves the exercise of discretion and judgment."[5] ***Lodl***, 253 Wis. 2d 323, ¶¶20-21. As material to this case, ***Lodl*** explains that "[t]here is no immunity against liability associated with: 1) the performance of ministerial duties imposed by law; [and] 2) known and compelling dangers that give rise to

[5] WISCONSIN STAT. § 893.80(4) provides: "No suit may be brought against any [governmental subdivision] ... or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions."

ministerial duties on the part of public officers or employees." ***Id.***, ¶24. Dargenio does not dispute that if neither of these exceptions to immunity applies, then the School District is entitled to immunity under WIS. STAT. § 893.80(4).

¶19 Dargenio argues, without citation to relevant authority, that the case law considering the same exceptions to state immunity has "little to no precedential value for this municipal case because Wisconsin differentiates between immunity for the state and municipalities." Dargenio, however, fails to deal with our supreme court's statements to the contrary. *See* ***C.L. v. Olson***, 143 Wis. 2d 701, 716 n.9, 422 N.W.2d 614 (1988) (the same analysis as to the exceptions to governmental immunity applies "with equal force" in municipal and state immunity cases); *see also* ***Kimps v. Hill***, 200 Wis. 2d 1, 13 & n.10, 546 N.W.2d 151 (1996) (applying the holding regarding exceptions to governmental immunity in a case involving a claim against a municipality to a claim against state employees); ***Lodl***, 253 Wis. 2d 323, ¶24 (stating the law as to exceptions to municipal and state immunity without distinguishing between the two: "[b]oth state and municipal immunity are subject to several exceptions" including the ministerial duty and known and compelling danger exceptions).

¶20 Indeed, our supreme court has similarly analyzed these exceptions in the context of governmental immunity for municipalities and for the state. *See, e.g.*, ***Pries v. McMillon***, 2010 WI 63, 326 Wis. 2d 37, 784 N.W.2d 648 (State Fair Park employee); ***Umansky v. ABC Ins. Co.***, 2009 WI 82, 319 Wis. 2d 622, 769 N.W.2d 1 (state Camp Randall Stadium director of facilities); ***Lodl***, 253 Wis. 2d 323 (town police officer); ***Kimps***, 200 Wis. 2d 1 (state university staff); ***Barillari v. Milwaukee***, 194 Wis. 2d 247, 533 N.W.2d 759 (1995) (city police department); ***C.L.***, 143 Wis. 2d 701 (state parole officer); ***Cords v. Anderson***, 80 Wis. 2d 525, 259 N.W.2d 672 (1977) (state scientific area manager). Accordingly, we will seek

guidance from precedent pertaining to the exceptions in the context of both municipal and state governmental immunity.

B. Ministerial Duty Exception

¶21 The School District argues that it is entitled to summary judgment on the ground that the ministerial duty exception does not apply to abrogate its governmental immunity.

¶22 As a preliminary matter, the School District argues that Dargenio has forfeited his claim that the ministerial duty exception does apply to abrogate the School District's governmental immunity, because Dargenio did not raise the ministerial duty exception in the proceedings related to the School District's second motion for summary judgment "upon which this appeal is based." However, both parties did raise and argue the ministerial duty exception in the proceedings related to the School District's first motion for summary judgment. When denying that first motion for summary judgment, the circuit court addressed the ministerial duty exception in passing, suggesting that it likely does not apply here, and proceeded to focus on the known and compelling danger exception, indicating that Dargenio was entitled to additional discovery as to that exception. Consistent with the court's comments, subsequent summary judgment proceedings addressed the known and compelling danger exception only. Because the parties did raise in the first motion for summary judgment and the circuit court did consider the ministerial duty exception, we conclude that Dargenio has not forfeited his ministerial duty exception claim, and we proceed to address the ministerial duty exception on its merits.

¶23 "A ministerial duty is one that '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 (quoted source omitted). It is a duty that has been "positively imposed by law, and its performance required at a time and in a manner, or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion." ***Id.***, ¶26 (quoted sources omitted).

¶24 "The first step in the ministerial duty analysis is to identify a source of law or policy that imposes the alleged duty." ***American Family Mut. Ins. Co. v. Outagamie Cnty.***, 2012 WI App 60, ¶13, 341 Wis. 2d 413, 816 N.W.2d 340. The School District contends that no such law or policy exists in this case. We agree. The record is devoid of any law or regulation imposing a duty on the School District to handle the scorers table in any particular manner. The record establishes that there is also no written policy governing the set up of the scorers table for use or storage, but rather only an informal understanding of where the table *should* be kept. Accordingly, there is no ministerial duty based on the first step of the analysis. *Cf.* ***Lodl***, 253 Wis. 2d 323, ¶¶27-31 (policy manual that provided a guideline as to how officers *should* manually control traffic did not establish a ministerial duty to undertake manual traffic control).

¶25 The absence of any policy also sinks Dargenio's argument to the contrary. Dargenio broadly argues that the School District has a ministerial duty to comply with the safe place statute *to follow its own internal policy* for safely storing the scorers table in the corner of the gymnasium with the bench in the outward position. However, as stated above, the record reveals no such policy. Dargenio cites to testimony stating what the custodial staff normally *do*, which is to store the scorers table in the corner with the bench extended outward, but points

to no evidence that the staff do so pursuant to any *policy*. Rather, the custodial staff testified that no developed procedure governs how they handle the scorers table.

¶26 Dargenio also argues that our supreme court has relaxed the ministerial duty definition set out in ***Lodl*** to bring some discretionary decisions within the ministerial duty exception's ambit, citing ***Bostco LLC v. Milwaukee Metro. Sewerage Dist.***, 2013 WI 78, 350 Wis. 2d 554, 835 N.W.2d 160. In that case, our supreme court reiterated its holding from an earlier case, ***Milwaukee Metro. Sewerage Dist. v. City of Milwaukee***, 2005 WI 8, 277 Wis. 2d 635, 691 N.W.2d 658, that a municipality has a ministerial duty to abate a known continuing nuisance, even though there may be different methods of abatement from which to choose. ***Bostco***, 350 Wis. 2d 554, ¶¶3, 41. However, Dargenio points to no such known continuing nuisance in this case. Indeed, while Dargenio's expert testified that the scorers table should not have been stored unrestrained because it is so front-heavy that a small exertion of force from the back can push it over, none of the high school staff who had worked with the scorers table since 1991 were aware of any incidents where the table had fallen over, and those who were asked testified that they were not aware that the scorers table is front-heavy. Because this case does not concern a known continuing source of injury, ***Bostco*** does not apply.

¶27 More significantly, the precise language from ***Bostco*** that Dargenio highlights in support of his "relaxed" ministerial duty test, is in a concurrence opinion and keeps intact the requirement of a policy for the ministerial duty exception to immunity to apply. *See* ***id.***, ¶112 ("a decision to adopt (or not adopt) a certain policy would be shielded by immunity, but the implementation of the

policy would" not (Gableman, J., concurring)). Dargenio fails to identify any policy for the School District to implement here.[6]

¶28 In sum, Dargenio fails to identify any source of law or policy that imposes on the School District the duty to handle the scorers table in any particular manner. Accordingly, we conclude that the School District is entitled to summary judgment as to the ministerial duty exception to its governmental immunity.

C. Known and Compelling Danger Exception

¶29 The School District argues that it is also entitled to summary judgment on the ground that the known and compelling danger exception does not abrogate its governmental immunity.

¶30 The known and compelling danger exception arises when "there exists a known present danger of such force that the time, mode and occasion for performance [are] evident with such certainty that nothing remains for the exercise of judgment and discretion." ***Lodl***, 253 Wis. 2d 323, ¶38 (quoted source omitted). The ministerial duty arises "by virtue of particularly hazardous circumstances—circumstances that are both known to the municipality or its officers and

[6] Dargenio also relies on the ruling in ***Anderson v. City of Milwaukee***, 199 Wis. 2d 479, 493-94, 544 N.W.2d 630 (Ct. App. 1996) that the City has a ministerial duty under the safe place statute to safely design, construct, and maintain a city-owned farmers market walkway. However, our supreme court reversed, ruling that the City waived the governmental immunity defense by not pleading it as an affirmative defense. ***Anderson v. City of Milwaukee***, 208 Wis. 2d 18, 21, 559 N.W.2d 563 (1997). The court expressly stated that, "Since this determination is dispositive, and since, therefore we do not reach the ministerial duty—safe place issue, we emphasize that our decision should not be taken as approval of the reasoning of the Court of Appeals on that issue." ***Id.*** at 37 n.17. Accordingly, and because this case does not concern the design, construction, and maintenance of a facility, our decision in ***Anderson*** does not help Dargenio.

sufficiently dangerous to require an explicit, non-discretionary municipal response." ***Id.***, ¶39. "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." ***Heuser ex rel. Jacobs v. Community Ins. Corp.***, 2009 WI 151, ¶23, 321 Wis. 2d 729, 774 N.W.2d 653; *see also* ***Kimps***, 200 Wis. 2d at 15-16 (when an officer is faced with a compelling and known danger, the officer has a clear and absolute duty to act); ***C.L.***, 143 Wis. 2d at 715 ("circumstances may give rise to such a certain duty where ... 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"). The application of the known and compelling danger exception to governmental immunity is by nature "case-by-case." ***Lodl***, 253 Wis. 2d 323, ¶38.

¶31 The known and compelling danger exception to governmental immunity was first established in ***Cords***, 80 Wis. 2d 525. There, the plaintiffs were seriously injured when they fell into a deep gorge while hiking at night on a hazardous portion of a trail at a state-owned nature preserve. ***Id.*** at 531-32, 534-36. The manager of the preserve knew that the drop-off from which the plaintiffs fell was dangerous, particularly at night, but did nothing to advise the public or his supervisors of the hazard. ***Id.*** at 536-37. The court concluded that "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 (emphasis added). The "facts here" on which the court relied were: "[The manager] knew the terrain at the glen was dangerous particularly at night; he was in a position as park manager to do something about it; he failed to do anything about it." ***Id.*** at 541.

¶32 In ***Cords***, the governmental entity was held liable because it was aware of a compelling danger but nonetheless failed to act. Here, the record does not establish either the existence of a compelling danger or the School District's awareness of a compelling danger triggering the duty to act.

¶33 A reasonable inference from the evidence favorable to Dargenio is that the scorers table was "tippy" on February 8. However, nothing in the record supports the conclusion that the tippy table being situated a few feet from where it is normally stored can be likened to the "'compelling and known' danger posed by a path passing within inches of a 90-foot cliff." ***Kimps***, 200 Wis. 2d at 16. Nor, based on the testimony of the custodial staff—that the table was not front-heavy in their experience, and that it had not tipped over in all their years of working with it, dating back to 1991—can it be concluded that the School District was aware of any compelling danger associated with the table that "creates an absolute, certain and imperative duty to act." *See* ***Heuser***, 321 Wis. 2d 729, ¶23.

¶34 The circuit court ruled that the scorers table was a danger and the School District should have known it was a danger because "it did tip over." The circuit court's approach, that the accident speaks for itself, is not a correct analysis under the law set forth above. Under a correct analysis, the evidence in the record does not suffice to establish that the scorers table, as it was found on February 8, was a known and compelling danger.

¶35 The key to the correct analysis is that "Wisconsin law does not require knowledge of the specific cause of the injury; it determines knowledge from the general danger of the circumstances." ***Heuser***, 321 Wis. 2d 729, ¶22. "A party cannot work backwards from a consequence to create" a known and compelling danger that triggers a ministerial duty to fix. ***Kimps***, 200 Wis. 2d at

12. In ***Cords***, the manager knew of the general danger of the trail skirting the gorge without anyone having fallen into the gorge. The same cannot be said here, where there was no evidence of tippyness until the scorers table fell onto its front.

¶36 Unlike in ***Cords***, there is no evidence in this case that anyone could tell that the scorers table was dangerous just by looking at it or based on experience. Apparently none of the adults who were in the gymnasium before the accident looked at the scorers table and saw the obvious hazard that the circuit court seems to have assumed was both present and obvious to all. It was not like a pile of broken glass or a collapsed bleacher, which people would see and know that immediate attention was required. The facts cited by the circuit court and repeatedly relied on by Dargenio may be relevant to the issue of negligence, but they do not establish a known danger compellingly in need of an immediate fix.

¶37 In sum, we conclude that the School District is entitled to summary judgment as to the known and compelling danger exception to its governmental immunity.

CONCLUSION

¶38 For the reasons stated, we conclude that neither the ministerial duty exception nor the known and compelling danger exception applies to abrogate the School District's governmental immunity. Therefore, we reverse the circuit court's order denying the School District's motion for summary judgment.

By the Court.—Order reversed.

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