COURT OF APPEALS
DECISION
DATED AND FILED

September 7, 2017

Diane M. Fremgen
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. 2016AP1497 **Cir. Ct. No. 2014CV601**

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

HAILEY SEITZ, BY HER GUARDIAN AD LITEM WILLIAM G. SKEMP, ROGER SEITZ AND SARA SEITZ,

PLAINTIFFS-RESPONDENTS,

ABC INSURANCE COMPANIES,

INVOLUNTARY-PLAINTIFF,

V.

DENISE BARRETT, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, XYZ INSURANCE COMPANIES AND EMPLOYERS MUTUAL CASUALTY COMPANY,

DEFENDANTS,

CITY OF PRAIRIE DU CHIEN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Reversed and cause remanded with directions.*

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

¶1 PER CURIAM. Hailey Seitz was injured by a vehicle while attempting to ride her bicycle through a crosswalk. Hailey and her parents, Roger and Sara Seitz (Seitz), filed a lawsuit against the City of Prairie du Chien alleging that the City was negligent in maintaining the crosswalk. The City appeals the order denying its motion for summary judgment.[1] For the reasons discussed below, we reverse.

BACKGROUND

¶2 Hailey was riding her bike. She stopped at an intersection with a crosswalk to wait for traffic to clear. The crosswalk was indicated by a yellow diamond-shaped sign containing a picture of a pedestrian and another yellow rectangular sign directly beneath bearing the word "CROSSWALK." The crosswalk was marked by faded lines. As Hailey crossed, she collided with a car.

[1] This court granted leave to appeal the order. *See* WIS. STAT. RULE 809.50(3) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Seitz also filed suit against a driver who was stopped and waiting to turn left at the intersection and who motioned for Hailey to cross the street. That driver was dismissed from the suit on summary judgment and, although Seitz appealed, *see* ***Seitz v. Barrett***, No. 2016AP1316, that appeal was voluntarily dismissed and is no longer pending.

¶3 Seitz alleged that the City "was negligent in regards to their maintenance of the crosswalk at the [relevant] intersection," asserting more specifically that the crosswalk paint was faded to the point that the paint was no longer visible. The City moved for summary judgment, arguing that it was entitled to governmental immunity from the negligence claim and that no recognized exception to immunity applied. The circuit court denied summary judgment, determining that there was a genuine issue of material fact as to whether the known danger exception to immunity applied. The City appeals.

DISCUSSION

¶4 We review summary judgment decisions de novo, applying the same methodology as the circuit court. ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503. Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2).

¶5 WISCONSIN STAT. § 893.80(4) immunizes municipalities and their employees against liability for "any act that involves the exercise of discretion and judgment." ***Lodl v. Progressive N. Ins. Co.***, 2002 WI 71, ¶¶20-21, 253 Wis. 2d 323, 646 N.W.2d 314.[2] Exceptions to governmental immunity include the "known

[2] WISCONSIN STAT. § 893.80(4) provides that "[n]o suit" may be brought against a "governmental subdivision" or "its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions." The words "legislative, quasi-legislative, judicial or quasi-judicial functions" in § 893.80(4) have been interpreted as synonymous with the word "discretionary." *See* ***Legue v. City of Racine,*** 2014 WI 92, ¶42, 357 Wis. 2d 250, 849 N.W.2d 837.

danger" exception, which is a "narrow, judicially-created exception that arises only when there exists a danger that is known and compelling enough to give rise to a ministerial duty on the part of a municipality or its officers." ***Id.***, ¶4. Whether the City is immune from suit under § 893.80(4) is a question of law that we review independently. *See* ***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).

¶6 We must first decide if the City's actions in maintaining the crosswalk are immunized from suit because such actions are discretionary in nature and there is no applicable exception. A duty is ministerial as opposed to discretionary if it 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." ***Lister v. Board of Regents of the Univ. of Wis. Sys.***, 72 Wis. 2d 282, 301, 240 N.W.2d 610 (1976).

¶7 The City Public Works Department repaints crosswalk lines in the City once per year, usually before school starts. There is no specific schedule for street and crosswalk painting and it is done "[w]henever the opportunity present[s] itself." The City does not have any written policies regarding the painting of crosswalks or streets. It has an unwritten procedure to "paint as needed or as identified" through visual observation made by the Public Works employees as relayed to the Public Works Director. The City did not have knowledge prior to Hailey's accident that the crosswalk needed repainting.

¶8 The City argues that it is entitled to immunity because, as a matter of law, crosswalk maintenance is a discretionary function. We agree. Seitz does not

point to any statute, code, ordinance, rule, or policy that creates an absolute, certain, and imperative duty on the City to maintain its crosswalks in such a manner that nothing remains for the City's judgment or discretion. As the summary judgment papers established, the City uses its judgment to determine whether and when to repaint lines on city streets.

¶9 We further conclude that, as a matter of law, the crosswalk did not satisfy the known danger exception to immunity. The known danger exception applies 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." ***C.L. v. Olson***, 143 Wis. 2d 701, 715, 422 N.W.2d 614 (1988). For the exception to apply, the existing danger must be "compelling enough that a self-evident, particularized, and non-discretionary municipal action is required." ***Lodl***, 253 Wis. 2d 323, ¶40. The danger of harm must be more than a possibility. *See* ***C.L.***, 143 Wis. 2d at 722-23.

¶10 In the instant case, the crosswalk was located at an intersection. This serves to alert a reasonable driver that people might attempt to cross the street. There was also a visible sign alerting drivers to the crosswalk at the intersection. Additionally, photographs in the record show that the crosswalk was marked by visible though faded lines on the road. Further, Seitz has not identified any prior pedestrian-car accidents at that intersection. Moreover, even if we accept Seitz's argument that the crosswalk lines were not visible to an approaching driver, the existence of the intersection and the crosswalk signage preclude a determination that the crosswalk rose to the level of a known and compelling danger. We conclude that the crosswalk did not rise to the level of a known and compelling danger which would give rise to a ministerial duty by the City to act.

¶11 The cases cited in Seitz's brief do not support the existence here of the known danger exception.[3] In ***Cords v. Anderson***, 80 Wis. 2d 525, 259 N.W.2d 672 (1977), our supreme court applied the exception when a park manager knew about a 90-foot gorge located inches from a hiking trail. ***Id.*** at 538-41. The court held that the compellingly dangerous circumstances established a duty to warn that was "so clear and so absolute that it falls within the definition of a ministerial duty." *See* ***id.*** at 541-42. In ***Heuser v. Community Insurance Corp.***, 2009 WI App 151, 321 Wis. 2d 729, 774 N.W.2d 653, a student was severely injured while using a scalpel after two students had suffered scalpel-related injuries performing the same exercise earlier that day. ***Id.***, ¶¶2, 4, 7. This court applied the known danger exception, faulting the teacher for "doing nothing in the face of personal knowledge that using the scalpels raised a safety issue." ***Id.***, ¶17. Neither case is comparable to the case at bar; this case involves a marked crosswalk needing to be repainted at some time in the reasonably near future and where no prior pedestrian-car accidents were reported.

¶12 In sum, the City was entitled to summary judgment because its actions were immunized under WIS. STAT. § 893.80(4), and, as a matter of law, the known and compelling danger does not apply. We therefore reverse and remand to the circuit court with directions to grant the City's motion for summary judgment.

[3] As pointed out in the City's reply brief, Seitz improperly relies on an unpublished per curiam case in violation of WIS. STAT. RULE 809.23(3)(a) and (b). We disregard any argument relying on the unpublished per curiam decision.

By the Court.—Order reversed and cause remanded with directions.

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