COURT OF APPEALS
DECISION
DATED AND FILED

October 3, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP1633 **Cir. Ct. No. 2015CV67**

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

ROSS A. SCHMELZER,

PLAINTIFF-RESPONDENT,

WPS HEALTH PLAN, INC.,

INVOLUNTARY-PLAINTIFF,

V.

KEWAUNEE COUNTY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kewaunee County: D. T. EHLERS, Judge. *Reversed and cause remanded with directions*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Kewaunee County appeals a nonfinal order denying its motion for summary judgment seeking the dismissal of Ross Schmelzer's personal injury action.[1] The County asserts it is immune from liability under WIS. STAT. § 893.80(4) (2015-16), Wisconsin's governmental immunity statute.[2] We agree. Therefore, we reverse the order and remand the matter with directions.

BACKGROUND

¶2 The relevant facts are undisputed. Schmelzer was riding his bicycle in Kewaunee County when he encountered loose gravel at an intersection. Schmelzer rode approximately 15-20 feet into the loose gravel before he fell, sustaining injuries. Earlier that day, the County had been chip sealing the road at that intersection. Chip sealing is a road maintenance operation where oil is applied to the roadway followed by an aggregate, which consisted of gravel. The mixture is rolled so the aggregate bonds to the oil, creating a new surface. When a road is chip sealed, there will be areas of loose gravel until there has been adequate compaction. County workers placed "loose gravel" signs on two of the four roads leading to the intersection, choosing to place one of the signs on the

[1] We granted leave to appeal the nonfinal order on September 9, 2016. *See* WIS. STAT. RULE 809.50.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

road from which traffic would enter the intersection at a higher speed. Schmelzer entered the intersection from a road that had no "loose gravel" sign.

¶3 Schmelzer filed the underlying personal injury suit. The County moved for summary judgment, arguing it is immune from suit under WIS. STAT. § 893.80(4). The circuit court denied the motion, and this appeal now follows.

DISCUSSION

¶4 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).

¶5 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." ***Lodl v. Progressive Northern Ins. Co.***, 2002 WI 71, ¶¶20-21, 253 Wis. 2d 323, 646 N.W.2d 314. Relevant to this appeal, there 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 ministerial duties on the part of public officers or employees." ***Id.***, ¶24.

¶6 A duty is ministerial, as opposed to discretionary, if it 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 Univ. of Wis. Sys.***, 72 Wis. 2d 282, 301, 240 N.W.2d 610 (1976). This narrow definition acknowledges that many governmental actions, even those done under a legal obligation, require the exercise of judgment and therefore qualify as discretionary. ***Scott v. Savers Prop. & Cas. Ins. Co.***, 2003 WI 60, ¶28, 262 Wis. 2d 127, 663 N.W.2d 715. The known danger exception to governmental immunity applies in circumstances that are "accidents waiting to happen," where injury is almost certain to occur if no government action is taken. ***Voss v. Elkhorn Area Sch. Dist.***, 2006 WI App 234, ¶19, 297 Wis. 2d 389, 724 N.W.2d 420.

¶7 Here, Schmelzer alleged the County was negligent by failing to place sufficient signs or safeguards warning bicyclists of loose gravel from the maintenance work and by failing to prevent an accumulation of gravel on the roadway. With respect to the first claim, this court has held that the initial decision to place a sign is discretionary and, thus, subject to immunity. *See* ***Harmann v. Schulke***, 146 Wis. 2d 848, 853-54, 432 N.W.2d 671 (Ct. App. 1988); *see also* ***Dusek v. Pierce Cty.***, 42 Wis. 2d 498, 506, 167 N.W.2d 246 (1969) (noting that whether to place a stop, warning, or yield sign at a given location is a matter that requires an exercise of discretion).

¶8 While the circuit court acknowledged that road sign placement decisions are discretionary, it ultimately denied the County's summary judgment motion, concluding the "contested legal issue" of the County's negligence in failing to prevent an accumulation of gravel on the roadway should be decided at trial. As the County points out, this conclusion works backward from the injury, and appears to confuse the issue of negligence with that of immunity. Our supreme court has recognized that "[j]ust because a jury can find that certain

conduct was negligent does not transform that conduct into a breach of a ministerial duty." ***Kimps v. Hill***, 200 Wis. 2d 1, 11, 546 N.W.2d 151 (1996). In fact, in ***Kimps***, the court assumed that negligence existed, noting "if it were otherwise, [the defendants] would not need to seek the protection of immunity." ***Id.*** at 12.

¶9 Citing ***Menick v. City of Menasha***, 200 Wis. 2d 737, 745, 547 N.W.2d 778 (Ct. App. 1996), Schmelzer nevertheless asserts that the County had a ministerial duty to maintain the highway so as not to cause injury to the public, and the County breached that duty when it allowed loose gravel to accumulate in the intersection. Schmelzer's reliance on ***Menick***, however, is misplaced. There, a property owner sued the City of Menasha after raw sewage from the city's sewer system twice flooded her basement. ***Id.*** at 741. Although the City claimed immunity from suit, this court disagreed, recognizing that "legislative authority to install a sewer system carries no implication of authority to create or maintain a nuisance." Thus, "while a cause of action alleging negligence is immunized, a nuisance created by negligent conduct is not protected by the governmental immunity statute." ***Milwaukee Metro. Sewerage Dist. v. City of Milwaukee***, 2003 WI App 209, ¶22, 267 Wis. 2d 688, 671 N.W.2d 346.

¶10 The instant case does not involve a nuisance claim. Therefore, we are not persuaded that the County's chip sealing project imposed a ministerial duty that falls outside of the immunity statute. Rather, the County's decision to maintain the intersection at issue by chip sealing—including where and how this maintenance was done—was discretionary. Schmelzer identified no rule or law providing the duty to chip seal, or otherwise governing the where and the how by which it should be done such that nothing remained for judgment or discretion.

¶11 Schmelzer alternatively claims the known and compelling danger exception to governmental immunity applies because the loose gravel created a dangerous condition. The law, however, does not impose a ministerial duty on the government to protect the public from every manifest danger. *See* ***Caraher v. City of Menomonie***, 2002 WI App 184, ¶15, 256 Wis. 2d 605, 649 N.W.2d 344. A dangerous situation will give rise to a ministerial duty when there exists a danger of such force that "the time, mode and occasion for performance is evident with such certainty that nothing remains for the exercise of judgment and discretion." ***Lodl***, 253 Wis. 2d 323, ¶38. The duty arises, therefore, "by virtue of particularly hazardous circumstances—circumstances that are both known to the municipality or its officers and sufficiently dangerous to require an explicit, non-discretionary municipal response." ***Id.***, ¶39.

¶12 Here, there is nothing in the record to indicate that the loose gravel created a hazardous condition so compelling that it required the County to take action to reduce or eliminate the danger. Even assuming Schmelzer is correct about the danger that may be created by loose gravel, there is nothing in the record to indicate there was a clear, self-evident, absolute ministerial duty imposed by law or arising out of the circumstances requiring a particularized action to remedy the situation. In fact, the County reasonably concluded the loose gravel would compact over time.

¶13 A ministerial duty to maintain the highway as Schmelzer suggests did not exist by operation of law, regulation or government policy, or otherwise arise by virtue of a known and compelling danger. Therefore, the County is entitled to immunity pursuant to WIS. STAT. § 893.80(4). We consequently reverse the order and remand the matter with directions to grant summary judgment in the County's favor.

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.